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# PROFESSIONAL STANDARDS AND THE FIRST AMENDMENT IN HIGHER EDUCATION: WHEN INSTITUTIONAL ACADEMIC FREEDOM COLLIDES WITH STUDENT SPEECH RIGHTS

CLAY CALVERT<sup>†</sup>

## INTRODUCTION

In 2016, a divided three-judge panel of the United States Court of Appeals for the Eighth Circuit upheld a student's expulsion from a public college's nursing program in *Keefe v. Adams*.<sup>1</sup> In doing so, the majority rejected Craig Keefe's contention that Central Lakes College ("CLC")<sup>2</sup> violated his First Amendment<sup>3</sup> speech rights by punishing him for messages posted on Facebook while off campus.<sup>4</sup>

In rebuffing Keefe, the majority declared it lawful for the Minnesota college to enforce against him tenets of the American Nurses Association's ("ANA")<sup>5</sup> Code of Ethics.<sup>6</sup> This code

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<sup>1</sup> 840 F.3d 523, 526 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 1448 (2017).

<sup>2</sup> Central Lakes College, part of the Minnesota State college and university system, describes itself as "a comprehensive community and technical college serving about 6,000 students per year." *General Information*, CENTRAL LAKES COLLEGE, <http://www.clcmn.edu/general-information-2> (last visited Feb. 1, 2018).

<sup>3</sup> The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated more than ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. *See* *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

<sup>4</sup> *Keefe*, 840 F.3d at 529–30.

<sup>5</sup> The ANA calls itself:

provides, in key part, that a “nurse treats colleagues, employees, assistants, and students with *respect and compassion*. This standard of conduct precludes any and all forms of prejudicial actions, any form of harassment or threatening behavior, or disregard for the effect of one’s actions on others.”<sup>7</sup> It adds that a “nurse maintains compassionate and caring relationships with colleagues”<sup>8</sup> and that “[i]n all encounters, nurses are responsible for retaining their professional boundaries.”<sup>9</sup>

CLC incorporated ANA’s code into its nursing program.<sup>10</sup> It also determined a trio of Keefe’s Facebook posts violated the code as “behavior unbecoming of the profession and [a] transgression of professional boundaries.”<sup>11</sup> Keefe, however, claimed he penned the posts in Fall 2012 solely to vent frustrations while “working full-time and studying for his nursing degree an additional 45–50 hours per week.”<sup>12</sup> Two posts, set forth below in unaltered, grammatically flawed form, expressed Keefe’s anger at a classmate:

- “Glad group projects are group projects. I give her a big fat F for changing the group power point at eleven last night and resubmitting. Not enough whiskey to control that anger.”<sup>13</sup>
- “[Y]ou keep reporting my post and get me banded. I don’t really care. If thats the smartest thing you can come up with than I completely understand why your going to fail out of

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[T]he premier organization representing the interests of the nation’s 3.6 million registered nurses. ANA advances the nursing profession by fostering high standards of nursing practice, promoting a safe and ethical work environment, bolstering the health and wellness of nurses, and advocating on health care issues that affect nurses and the public. ANA is at the forefront of improving the quality of health care for all.

About ANA, AMERICAN NURSES ASS’N, <http://www.nursingworld.org/FunctionalMenuCategories/AboutANA> (last visited Feb. 1, 2018).

<sup>6</sup> Keefe, 840 F.3d at 529–31. See AMERICAN NURSES ASSOCIATION, CODE OF ETHICS FOR NURSES (2015), <http://nursingworld.org/DocumentVault/Ethics-1/Code-of-Ethics-for-Nurses.html> (last visited Feb. 1, 2018).

<sup>7</sup> Keefe, 840 F.3d at 528 (emphasis added).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 529.

<sup>10</sup> The handbook for CLC nursing students, which Keefe acknowledged receiving, reviewing and understanding, required students “to uphold and adhere to” ANA’s ethics code. *Id.* at 528.

<sup>11</sup> *Id.*

<sup>12</sup> James Eli Shiffer, *Ex-Nursing Student Suffers Legal Setback over Facebook Posts*, STAR TRIB. (Nov. 6, 2016, 4:59 PM), <http://www.startribune.com/ex-nursing-student-suffers-legal-setback-over-facebook-posts/400132521>.

<sup>13</sup> Keefe, 840 F.3d at 526–27.

the RN program you stupid bitch . . . . And quite creeping on my page. Your not a friend of mine for a reason. If you don't like what I have to say than don't come and ask me, thats basically what creeping is isn't it. Stay off my page . . . ."<sup>14</sup>

In a third missive, Keefe conveyed not merely rage but possible violence, as he suggested giving "someone a hemopneumothorax"<sup>15</sup> and that he "might need some anger management."<sup>16</sup> Keefe testified that "a hemopneumothorax is a 'trauma' where the lung is punctured and air and blood flood the lung cavity; it is not a medical procedure."<sup>17</sup>

In brief, Keefe's disquieting off-campus, internet-posted messages led to his expulsion because they were "unprofessional"<sup>18</sup> when viewed through the prism of ANA's ethics code. This outcome is profoundly problematic because an ethics code of guiding aspirational principles suddenly takes on binding legal force for students who have not achieved professional status. Furthermore, the fact that the ethical principles quoted above<sup>19</sup> lack definitional precision, a flaw typically exposing a statute to a void-for-vagueness challenge,<sup>20</sup> was cursorily dismissed by the Eighth Circuit. The majority simply reasoned that ANA's "standards are necessarily quite general, but they are widely recognized and followed"<sup>21</sup> and students such as Craig Keefe, in turn, "consent in writing to be bound"<sup>22</sup> by them. Put bluntly, Keefe signed away his First Amendment rights.

But most troubling from a pro-free speech perspective, the appellate court upheld the college student's expulsion using a test developed by the United States Supreme Court in *Hazelwood*

<sup>14</sup> *Id.* at 527.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 527 n.3.

<sup>18</sup> *Id.* at 531.

<sup>19</sup> *Supra* notes 7–9 and accompanying text.

<sup>20</sup> See *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (observing that "[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined" such that they fail to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited . . . ."); see also ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES 987, § 11.2.2 (5th ed. 2015) ("A law is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted.").

<sup>21</sup> *Keefe*, 840 F.3d at 532.

<sup>22</sup> *Id.*

*School District v. Kuhlmeier*.<sup>23</sup> That case examined censorship of the on-campus speech of high school students occurring within the curriculum. In particular, *Hazelwood* involved suppression of two articles in a school-sponsored newspaper.<sup>24</sup> The Court held “that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”<sup>25</sup>

Over Judge Jane Kelly’s dissent, the two-judge *Keefe* majority ripped *Hazelwood* from its school-sponsored, high-school speech moorings and stretched it to college students authoring decidedly independent, non-school-sponsored messages on their own time while off campus.<sup>26</sup> In doing so, the Eighth Circuit fashioned a new rule. Quoting *Hazelwood*, this nascent standard deems that “college administrators and educators in a professional school have discretion to require compliance with recognized standards of the profession, both on and off campus, ‘so long as their actions are reasonably related to legitimate pedagogical concerns.’”<sup>27</sup>

The italicized passage from *Hazelwood*, melded into the *Keefe* test, provides meager protection for student speech in high schools, let alone colleges. Frank LoMonte, former executive director of the Student Press Law Center, laments that the *Hazelwood* rule is little more “than a differentially reviewed facsimile of reasonableness.”<sup>28</sup> Similarly, attorney David Hudson

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<sup>23</sup> 484 U.S. 260 (1988).

<sup>24</sup> One of the censored articles related to the experiences with pregnancy of students at the high school, while the other addressed “the impact of divorce on students at the school.” *Id.* at 263.

<sup>25</sup> *Id.* at 273.

<sup>26</sup> Dissenting in *Keefe* on the free-speech issue, Judge Jane Kelly departed from the majority by rejecting the application of *Hazelwood*. In doing so, she reasoned that “Keefe’s speech was off-campus, was not school-sponsored, and cannot be reasonably attributed to the school. *Hazelwood*’s ‘reasonably related to legitimate pedagogical concerns’ test is therefore inapplicable in this case.” *Keefe*, 840 F.3d at 542 (Kelly, J., dissenting). Kelly added “[t]he fact that Keefe was a college student also cautions against too lenient an interpretation of his First Amendment protections.” *Id.* at 542 n.11.

<sup>27</sup> *Id.* at 531 (majority opinion) (emphasis added) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)).

<sup>28</sup> Frank D. LoMonte, “*The Key Word Is Student*”: *Hazelwood Censorship Crashes the Ivy-Covered Gates*, 11 FIRST AMEND. L. REV. 305, 307 (2013).

dubs *Hazelwood* a “deferential reasonableness standard[.]”<sup>29</sup> Highlighting another problem, Professor Edward Carter and his colleagues argue that *Hazelwood*’s “reasonably related to legitimate pedagogical concerns”<sup>30</sup> test “does not offer clear parameters.”<sup>31</sup> Perhaps most damningly, Dean Erwin Chemerinsky asserts that “*Hazelwood* marks a shift to an authoritarian approach to speech in schools,”<sup>32</sup> with its test amounting merely to “the classic phrasing of the rational basis review.”<sup>33</sup>

*Keefe*, which the Supreme Court in April 2017 declined to disturb,<sup>34</sup> sadly extends what LoMonte decries as “an increasingly common pattern in which colleges assert the *Hazelwood* level of control over their students’ speech.”<sup>35</sup> That trend continues in 2017.

For example, the United States Court of Appeals for the Tenth Circuit in March 2017 acknowledged that *Hazelwood*’s “pedagogical concern standard is highly deferential.”<sup>36</sup> Nonetheless, it enforced *Hazelwood* against a college student in a graduate-level course, holding that “[t]eaching students to avoid inflammatory language when writing for an academic audience qualifies as a legitimate pedagogical goal.”<sup>37</sup>

Adding unfortunate insult and irony to Craig Keefe’s situation, most appellate courts today<sup>38</sup> examining the

<sup>29</sup> DAVID L. HUDSON, JR., LET THE STUDENTS SPEAK!: A HISTORY OF THE FIGHT FOR FREE EXPRESSION IN AMERICAN SCHOOLS 100 (2011).

<sup>30</sup> *Hazelwood*, 484 U.S. at 273.

<sup>31</sup> Edward L. Carter et al., *Applying Hazelwood to College Speech: Forum Doctrine and Government Speech in the U.S. Courts of Appeals*, 48 S. TEX. L. REV. 157, 161 (2006).

<sup>32</sup> Erwin Chemerinsky, Address, *The Hazelwooding of the First Amendment: The Deference to Authority*, 11 FIRST AMEND. L. REV. 291, 292 (2013).

<sup>33</sup> *Id.* at 294.

<sup>34</sup> *Keefe v. Adams*, 137 S. Ct. 1448 (2017).

<sup>35</sup> LoMonte, *supra* note 28, at 305.

<sup>36</sup> *Pompeo v. Bd. of Regents of the Univ. of N.M.*, 852 F.3d 973, 984 (10th Cir. 2017).

<sup>37</sup> *Id.* at 989.

<sup>38</sup> See, e.g., *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 394 (5th Cir. 2015) (applying the *Tinker* standard to student speech posted on Facebook and YouTube while off campus, and noting that “four other circuits have held that, under certain circumstances, *Tinker* applies to speech which originated, and was disseminated, off-campus”); *Kowalski v. Berkeley Cty. Schs.*, 652 F.3d 565, 574 (4th Cir. 2011) (applying *Tinker* to uphold punishment of a high school student for speech posted on MySpace, and remarking that “other circuits have applied *Tinker* to such circumstances”).

punishment of high school students for off-campus, online expression use a much more free-speech-protective standard than *Hazelwood*. Specifically, they generally apply the material disruption test from the Supreme Court's 1969 seminal ruling in *Tinker v. Des Moines Independent Community School District*.<sup>39</sup> *Tinker* is considered by many scholars to be "the high point of First Amendment freedom for students,"<sup>40</sup> whereas *Hazelwood* "was a resounding victory for school administrators[.]"<sup>41</sup> In brief, college student Craig Keefe was treated worse for his off-campus speech by the Eighth Circuit, which applied *Hazelwood*, than most federal appellate courts, applying the more rigorous *Tinker* test, would treat high school students for similar Facebook posts.

Keefe's attorney, Jordan Kushner, blasted the Eighth Circuit for rendering "an extremely disturbing decision which could be interpreted to allow college administrators to discipline or expel a student for private conduct outside of class and campus under the guise of professional standards."<sup>42</sup> Kushner claimed Craig Keefe "basically had to give up on the medical profession"<sup>43</sup> due to CLC's enforcement of the ANA's professional standards.

In contrast to the Eighth Circuit, two other appellate courts—the United States Court of Appeals for the Ninth Circuit in 2015 in *Oyama v. University of Hawaii*<sup>44</sup> and the Supreme Court of Minnesota in 2012 in *Tatro v. University of Minnesota*<sup>45</sup>—refused to embrace *Hazelwood* in cases involving

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<sup>39</sup> 393 U.S. 503 (1969). In *Tinker*, which involved the on-campus speech rights of high school and junior high school students, the Court held that school officials can permissibly censor speech if there are actual facts that reasonably lead them "to forecast substantial disruption of or material interference with school activities." *Id.* at 514. In brief, student speech can be safely stifled if officials believe it would "materially and substantially disrupt the work and discipline of the school." *Id.* at 513. Adding teeth to this test, the Court specified that an "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 508.

<sup>40</sup> Mark Strasser, *Tinker ReMorse: On Threats, Boobies, Bullying, and Parodies*, 15 FIRST AMEND. L. REV. 1, 2 (2016).

<sup>41</sup> HUDSON, *supra* note 29, at 101.

<sup>42</sup> Mike Mosedale, *Nursing Student Loses Speech Fight*, MINN. LAW. (Oct. 27, 2016), <http://minnlawyer.com/2016/10/27/nursing-student-loses-speech-fight/>.

<sup>43</sup> Steven Nelson, *Federal Court Upholds College Punishment for Off-Campus Facebook Posts Said To Violate Vague Standards*, U.S. NEWS & WORLD REP. (Oct. 27, 2016, 12:25 PM), <https://www.usnews.com/news/articles/2016-10-27/federal-court-upholds-college-punishment-for-off-campus-facebook-posts-said-to-violate-vague-standards>.

<sup>44</sup> 813 F.3d 850, 863 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2520 (2016).

<sup>45</sup> 816 N.W.2d 509, 518 (Minn. 2012).

college students held to professional standards. Yet in both *Oyama* and *Tatro*, the appellate courts nonetheless upheld enforcement of professional standards and rejected First Amendment-based student speech claims.<sup>46</sup>

Specifically, the Ninth Circuit concluded that the University of Hawaii did not violate postbaccalaureate, education-certificate student Mark Oyama's speech rights when it denied his student-teacher application due largely to his comments about the appropriateness of sexual relationships between adults and children.<sup>47</sup> Writing for a unanimous three-judge panel, Kim Wardlaw rejected *Hazelwood*.<sup>48</sup> Instead, she reasoned Oyama's rights were not infringed because the University's "decision related directly to defined and established professional standards, was narrowly tailored to serve the University's core mission of evaluating Oyama's suitability for teaching, and reflected reasonable professional judgment."<sup>49</sup>

Three years prior to *Oyama*, the Supreme Court of Minnesota in *Tatro* held that the University of Minnesota did not trample on the First Amendment rights of an undergraduate mortuary-science student when it disciplined her for several Facebook posts.<sup>50</sup> As in *Oyama*, the Minnesota high court declined to adopt *Hazelwood*'s test.<sup>51</sup> Instead, it held that "a university may regulate student speech on Facebook that violates established professional conduct standards,"<sup>52</sup> provided the restrictions are "narrowly tailored and directly related to established professional conduct standards."<sup>53</sup>

Despite deploying different tests, *Keefe*, *Oyama*, and *Tatro* each involved what one commentator calls "a three-sided relationship between universities, the professions, and the

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<sup>46</sup> See *infra* Part II (examining *Oyama* and *Tatro* in greater detail).

<sup>47</sup> *Oyama*, 813 F.3d at 856–58, 860–61.

<sup>48</sup> In rejecting application of *Hazelwood*, Judge Wardlaw observed that "[i]n the twenty-seven years since *Hazelwood*, we too have declined to apply its deferential standard in the university setting." *Id.* at 862.

<sup>49</sup> *Id.* at 861.

<sup>50</sup> The discipline included lowering student Amanda Tatro's grade in one class from a C+ to an F. *Tatro*, 816 N.W.2d at 514–15, 524.

<sup>51</sup> See *id.* at 518 ("[W]e decline to extend the legitimate pedagogical concerns standard to a university's imposition of disciplinary sanctions for a student's Facebook posts.").

<sup>52</sup> *Id.* at 521.

<sup>53</sup> *Id.*



students trained for those professions by universities.”<sup>54</sup> In other words, universities’ policies affecting speech in some academic programs are determined by professions’ policies which, in turn, are imposed on students seeking entry into those professions. If a university tethers a speech-restricting policy to a profession’s speech-restricting policy, this seemingly increases the odds of the university’s policy passing constitutional muster in the face of a lawsuit. The probability of passing constitutional muster increases due to deference courts extend in curricular matters under the purview of institutional academic freedom.<sup>55</sup> If a university points to a professional standard for external authority justifying a speech restriction, then that deference seemingly escalates, with the professional standard legitimating the university’s actions.<sup>56</sup> This may be one reason why, as Professor Mary-Rose Papandrea points out in a 2017 article, “public colleges and universities are increasingly punishing students for their speech when it is deemed inconsistent with vague ‘professionalism’ standards.”<sup>57</sup>

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<sup>54</sup> William Bush, Note, *What You Sign Up For: Public University Restrictions on “Professional” Student Speech After Tatro v. University of Minnesota*, 20 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 547, 553 (2014) (emphasis omitted).

<sup>55</sup> See *infra* Part I (addressing institutional academic freedom).

<sup>56</sup> In the absence of an external professional standard, public universities still may permissibly regulate a student’s classroom-based speech in the interest of serving a more general, if not nebulous, notion of workplace professionalism. For instance, in *Corlett v. Oakland University Board of Trustees*, 958 F. Supp. 2d 795 (E.D. Mich. 2013), Judge Patrick Duggan rejected a First Amendment challenge brought by a student disciplined for writings submitted in an English course at Oakland University. *Id.* at 797. Among other things, the writings described the course’s professor “as ‘stacked’ and graphically compared her to a sitcom character he fetishized in a writing assignment.” *Id.* In rebuffing the student’s First Amendment argument, Judge Duggan reasoned that “universities undoubtedly retain some responsibility to teach students *proper professional behavior*, in other words, to prepare students to behave and communicate properly in the workforce.” *Id.* at 805 (emphasis added). He added that the university defendants “reasonably could have found [the student’s] writings inappropriate from a student to a teacher (as they certainly would have been from a teacher to a student) and punished him accordingly.” *Id.* at 809.

<sup>57</sup> Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 MINN. L. REV. 1801, 1803 (2017).

Using the decisions in *Keefe*, *Oyama* and *Tatro* as analytical springboards,<sup>58</sup> this Article examines rising tensions between institutional academic freedom and the First Amendment speech rights of college students. Specifically, the friction addressed here occurs when universities enforce external professional standards on students within their curricula. Initially, Part I provides a primer on institutional academic freedom.<sup>59</sup> Part II then contrasts the vastly deferential *Hazelwood* approach to professional-standards disputes embraced by the Eighth Circuit

<sup>58</sup> Other appellate court rulings also directly involve professional standards affecting the speech rights of public college and university students. *See, e.g.*, *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012) (involving the alleged application of the American Counseling Association's ("ACA") code of ethics to an Eastern Michigan University student, Julea Ward, seeking a master's degree in counseling; featuring both First Amendment free expression and freedom of religion challenges to the University's expulsion of Ward after she, based on her Christian religious beliefs, requested that a client seeking same-sex counseling be referred to another counselor; and refusing to dismiss Ward's lawsuit because, although the University claimed it expelled her for violating the ACA's ethics code by requesting a referral of the client, "a reasonable jury could find otherwise—that the code of ethics contains no such bar and that the university deployed it as a pretext for punishing Ward's religious views and speech"); *Keeton v. Anderson-Wiley*, 664 F.3d 865, 876–77 (11th Cir. 2011) (involving a Christian graduate student in the school counseling program at Augustana State University ("ASU") who believed that members of the gay, lesbian, bisexual, transgender and queer/questioning ("GLBTQ") community suffer from identity confusion; upholding ASU's right to enforce tenets of the ACA's Code of Ethics against the student in the face of the student's claim that the code's imposition constituted viewpoint-based discrimination against her expressed beliefs regarding members of the GLBTQ community; and applying the test used in the United States Supreme Court's decision in *Hazelwood* to hold "that ASU has a legitimate pedagogical concern in teaching its students to comply with the ACA Code of Ethics" and that the student "does not have a constitutional right to disregard the limits ASU has established for its clinical practicum and set her own standards for counseling clients in the clinical practicum"); *Brown v. Li*, 308 F.3d 939, 952, 954 (9th Cir. 2002) (upholding, under the United States Supreme Court's test from *Hazelwood*, "a pedagogically appropriate requirement that [a] thesis comply with professional standards governing his discipline" and adding that the only act of the University of California Santa Barbara officials in question "was a simple refusal to approve the section because it did not meet academic and professional standards. As a result, Plaintiff did not receive his degree earlier because he had not met the requirements to receive it") (emphasis added). *Keefe* and *Oyama* were selected here due to their timeliness, while *Tatro* was chosen because it was the first appellate court ruling involving Internet-posted, college-student expression running afoul of such standards. Additionally, unlike cases such as *Ward v. Polite* noted earlier in this footnote, *Keefe*, *Oyama* and *Tatro* involve pure free-speech claims rather than ones entangling free speech and religion.

<sup>59</sup> *Infra* notes 63–124 and accompanying text.

in *Keefe* with the somewhat more rigorous ones adopted by the Ninth Circuit in *Oyama* and Minnesota's Supreme Court in *Tatro*.<sup>60</sup>

Part III then proposes and defends a more free-speech-friendly standard for cases involving public university students who claim their First Amendment speech rights are impinged by enforcement of professional standards of care.<sup>61</sup> Finally, the Article concludes in that the Supreme Court must quickly hear a college-level, professional-standards case to definitively resolve the proper test that lower courts should apply in these disputes.<sup>62</sup> The Conclusion also emphasizes that drawing a legal distinction between college programs that are supposedly professional—ones preparing students for jobs requiring government certification or that are bound by profession-specific statutes—and those that are not is meritless. In brief, the same test proposed in Part III should apply to *any* college-level degree program when administrators cite an external professional standard of any kind to squelch speech.

#### I. INSTITUTIONAL ACADEMIC FREEDOM: CONTROLLING THE CURRICULUM TAUGHT

Academic freedom is arguably “the defining characteristic of a university.”<sup>63</sup> The principle, however, remains nebulous more than a century after the American Association of University Professors issued a Declaration of Principles in 1915 that marked “the first comprehensive analysis of academic freedom in the United States.”<sup>64</sup> Academic freedom, as one federal appellate court encapsulated it, is an “ill-defined right”<sup>65</sup> that does not exist as “a separate right apart from the operation of the First Amendment within the university setting.”<sup>66</sup>

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<sup>60</sup> *Infra* notes 125–251 and accompanying text.

<sup>61</sup> *Infra* notes 252–304 and accompanying text.

<sup>62</sup> *Infra* notes 305–325 and accompanying text.

<sup>63</sup> MARJORIE HEINS, *PRIESTS OF OUR DEMOCRACY: THE SUPREME COURT, ACADEMIC FREEDOM, AND THE ANTI-COMMUNIST PURGE* 23 (2013).

<sup>64</sup> David M. Rabban, *A Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment*, 53 *LAW & CONTEMP. PROBS.* 227, 232 (1990).

<sup>65</sup> *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1292 n.14 (10th Cir. 2004).

<sup>66</sup> *Id.*

The unsettled state of academic freedom, particularly as it ties to the First Amendment, is widely recognized.<sup>67</sup> Professor R. George Wright, for example, asserts that “[a]cademic freedom is largely unanalyzed, undefined, and unguided by principled application, leading to its inconsistent and skeptical or questioned invocation.”<sup>68</sup> Professor Alan Chen concurs, noting “the Supreme Court sporadically has made compelling statements about the importance of academic freedom, yet, it has been either unable or unwilling to develop a coherent framework for assessing the scope of constitutional academic freedom rights.”<sup>69</sup> Such compelling statements are largely found in aging cases like *Sweezy v. New Hampshire*<sup>70</sup> and *Keyishian v. Board of Regents of the State University of New York*<sup>71</sup> and, albeit perhaps somewhat less compellingly, in more recent ones such as *Grutter v. Bollinger*.<sup>72</sup>

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<sup>67</sup> See, e.g., Larry D. Spurgeon, *A Transcendent Value: The Quest To Safeguard Academic Freedom*, 34 J.C. & U.L. 111, 112 (2007) (“Scholars and judges disagree about the very definition of ‘academic freedom,’ the extent of its coverage, and whether it is entitled to judicial protection.”).

<sup>68</sup> R. George Wright, *The Emergence of First Amendment Academic Freedom*, 85 NEB. L. REV. 793, 794 (2007) (footnotes omitted).

<sup>69</sup> Alan K. Chen, *Bureaucracy and Distrust: Germaneness and the Paradoxes of the Academic Freedom Doctrine*, 77 U. COLO. L. REV. 955, 959 (2006).

<sup>70</sup> 354 U.S. 234 (1957). The Court in *Sweezy* reasoned that:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made.

*Id.* at 250.

<sup>71</sup> 385 U.S. 589 (1967). The Court in *Keyishian* opined:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

*Id.* at 603.

<sup>72</sup> 539 U.S. 306 (2003). The Court in *Grutter* wrote that “universities occupy a special niche in our constitutional tradition.” *Id.* at 329. It also recognized a “tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.” *Id.* at 328.

One facet of academic freedom is institutional academic freedom. Compared with individual academic freedom, which focuses on “the freedom of the individual faculty member,”<sup>73</sup> institutional academic freedom centers on “the freedom of a college or university to pursue its mission”<sup>74</sup> and “to make decisions that it believes best further that mission.”<sup>75</sup> This encompasses “the freedom to determine what may be taught[] [and] the freedom to determine how the subject matter will be taught . . . .”<sup>76</sup> As Justice Lewis Powell wrote nearly forty years ago in *Regents of the University of California v. Bakke*,<sup>77</sup> “[t]he freedom of a university to make its own judgments as to education includes,”<sup>78</sup> among other things, the freedom to determine “what may be taught[] [and] how it shall be taught . . . .”<sup>79</sup>

This language regarding freedom over what to teach and how to teach it springs from a passage in *The Open Universities in South Africa and Academic Freedom*<sup>80</sup> that Justice Felix Frankfurter famously quoted in *Sweezy*:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail “the four essential freedoms” of a university—to determine for itself on academic grounds who may teach, *what may be taught, how it shall be taught*, and who may be admitted to study.<sup>81</sup>

Justice David Souter reemphasized these principles in 2000, remarking that “[o]ur understanding of academic freedom has included not merely liberty from restraints on thought,

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<sup>73</sup> James D. Gordon III, *Individual and Institutional Academic Freedom at Religious Colleges and Universities*, 30 J.C. & U.L. 1, 1 (2003).

<sup>74</sup> *Id.* at 2.

<sup>75</sup> *Id.* at 6.

<sup>76</sup> WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* § 6.1.7, at 296 (5th ed., Student Version 2014).

<sup>77</sup> 438 U.S. 265 (1978).

<sup>78</sup> *Id.* at 312.

<sup>79</sup> *Id.* (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

<sup>80</sup> See Richard H. Hiers, *Institutional Academic Freedom vs. Faculty Academic Freedom in Public Colleges and Universities: A Dubious Dichotomy*, 29 J.C. & U.L. 35, 46–57 (2002) (providing an excellent review of the background, history, and content of this book).

<sup>81</sup> *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring) (emphasis added) (quoting *THE OPEN UNIVERSITIES IN SOUTH AFRICA AND ACADEMIC FREEDOM* 10–12 (1957)).

expression, and association in the academy, but also the idea that universities and schools should have the freedom to make decisions about how and what to teach.”<sup>82</sup> Writing on the Court’s opinion fifteen years earlier in *Regents of the University of Michigan v. Ewing*,<sup>83</sup> Professor Larry Spurgeon calls Stevens’ statement “a bow to the tradition of deference to the academic community.”<sup>84</sup>

Indeed, the autonomy imbuing institutional academic freedom<sup>85</sup> is sometimes accompanied by a healthy dose of judicial deference. For example, in delivering the Court’s opinion in *Grutter*, Justice Sandra Day O’Connor observed a “tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.”<sup>86</sup> Erica Goldberg and Kelly Sarabyn argue that O’Connor’s sentiment “bolstered the institutional view of academic freedom.”<sup>87</sup>

In addressing race as a law-school-admissions factor in *Grutter*, O’Connor reinforced the importance of deference, remarking that “[t]he Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer.”<sup>88</sup> She added that, in scrutinizing the admissions policy, the Court accounted for the fact that “complex educational judgments”<sup>89</sup> on issues such as admissions fall “primarily within the expertise of the university.”<sup>90</sup>

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<sup>82</sup> Bd. of Regents of the Univ. Wis. Sys. v. Southworth, 529 U.S. 217, 237 (2000) (Souter, J., concurring).

<sup>83</sup> 474 U.S. 214 (1985).

<sup>84</sup> Spurgeon, *supra* note 67, at 159.

<sup>85</sup> See *Blasdel v. Northwestern Univ.*, 687 F.3d 813, 816 (7th Cir. 2012) (en banc) (“And we must not ignore the interest of colleges and universities in institutional autonomy.”); see also Owen Fiss, *The Democratic Mission of the University*, 76 ALB. L. REV. 735, 739 (2012/13) (“One branch of the principle of academic freedom . . . confers upon the university a measure of autonomy from government regulation. It is based on the epistemological premise that such autonomy is most conducive to the attainment of knowledge and the truth that it necessarily implies.”) (internal citation omitted).

<sup>86</sup> *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

<sup>87</sup> Erica Goldberg & Kelly Sarabyn, *Measuring a “Degree of Deference”*: *Institutional Academic Freedom in a Post-Grutter World*, 51 SANTA CLARA L. REV. 217, 220 (2011).

<sup>88</sup> *Grutter*, 539 U.S. at 328.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

One interpretation of *Grutter*, Professor Paul Horwitz asserts, is that it “provides First Amendment support for a strong principle of institutional autonomy for academic institutions.”<sup>91</sup> This reading, he adds, “focuses on institutional deference . . . .”<sup>92</sup>

The foundational premise underlying such autonomy and deference, Professor Neal Katyal explains, is the Court’s recognition that universities “are better at making choices about educational matters than are generalist courts.”<sup>93</sup> Katyal elaborates that *Grutter*’s discussion of academic freedom “was built on a recognition of the First Amendment concerns of government intrusion into higher education, coupled with a healthy skepticism about the ability of generalist federal courts to make decisions for a university with respect to learning.”<sup>94</sup>

Justice Anthony Kennedy reiterated *Grutter*’s strong sense of deference to educational institutions in 2016 when delivering the majority opinion in the admissions-criteria case of *Fisher v. University of Texas*.<sup>95</sup> “Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission,” Kennedy opined.<sup>96</sup>

Deference sometimes is palpable in professional-standards cases like those at the heart of this Article. For example, in *Keeton v. Anderson-Wiley*,<sup>97</sup> the United States Court of Appeals for the Eleventh Circuit in 2011 upheld a public university imposing the American Counseling Association’s (“ACA”) Code of Ethics on a graduate student in a school-counseling program. Rejecting the student’s free-speech arguments against the code’s usage, the appellate court reasoned that the university’s decision to make students adhere to it was “subject to significant deference, not exacting constitutional scrutiny.”<sup>98</sup> As Judge William Pryor explained in *Keeton*, “we may not act as ‘ersatz deans or educators’ by second-guessing regular academic

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<sup>91</sup> Paul Horwitz, *Grutter’s First Amendment*, 46 B.C. L. REV. 461, 467 (2005).

<sup>92</sup> *Id.* at 556–57.

<sup>93</sup> Neal Kumar Katyal, *The Promise and Precondition of Educational Autonomy*, 31 HASTINGS CONST. L.Q. 557, 557 (2003).

<sup>94</sup> *Id.* at 563.

<sup>95</sup> *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2208 (2016).

<sup>96</sup> *Id.* at 2214.

<sup>97</sup> 664 F.3d 865, 880 (11th Cir. 2011).

<sup>98</sup> *Id.* at 879.

methods of a public university.”<sup>99</sup> He added that “[i]n matters of instruction and academic programs, federal judges must instead exercise restraint.”<sup>100</sup>

In 2000, the United States Court of Appeals for the Fourth Circuit in *Urofsky v. Gilmore*<sup>101</sup> privileged institutional academic freedom above that of individual faculty. The Fourth Circuit opined “that to the extent the Constitution recognizes any right of ‘academic freedom’ above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors . . . .”<sup>102</sup> It elaborated that “[t]he Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only *an institutional right of self-governance in academic affairs*.”<sup>103</sup> The United States Court of Appeals for the Sixth Circuit cited *Urofsky* approvingly in 2005,<sup>104</sup> thereby reinforcing the significance of institutional academic freedom.

Professor Larry Spurgeon argues that rather than constituting a right, institutional academic freedom is more akin to “a qualified immunity based upon the long tradition of deference to the academic community.”<sup>105</sup> Regardless of whether this is correct, the concept of institutional academic freedom provides theoretical footing for universities to enforce external professional standards in their curricula and certification processes. Indeed, if a public university’s decision to enforce a policy prohibiting possession of concealed weapons on campus—something with no bearing on the curriculum—falls within the scope of its “First Amendment right of academic freedom,”<sup>106</sup> then surely so does implementation of professional standards of care and conduct, either as part of the curriculum or a certification process for students.

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<sup>99</sup> *Id.* at 883 (Pryor, J., concurring) (quoting *Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991)).

<sup>100</sup> *Id.*

<sup>101</sup> 216 F.3d 401, 415–16 (4th Cir. 2000).

<sup>102</sup> *Id.* at 410.

<sup>103</sup> *Id.* at 412 (emphasis added).

<sup>104</sup> *Johnson-Kurek v. Abu-Absi*, 423 F.3d 590, 593 (6th Cir. 2005) (citing *Urofsky*, 216 F.3d at 410).

<sup>105</sup> Spurgeon, *supra* note 67, at 164.

<sup>106</sup> *Univ. of Utah v. Shurtleff*, 252 F. Supp. 2d 1264, 1276 (D. Utah 2003).



In addition to *Keefe v. Adams* addressed above,<sup>107</sup> the cases examined in the next Part demonstrate how institutional academic freedom over degree programs collides with the First Amendment speech rights of students in public colleges and universities<sup>108</sup> when those institutions impose professional standards affecting free expression. The conflict arises because the Supreme Court recognizes that a public university “must provide some protection to its students’ First Amendment interests”<sup>109</sup> and that such institutions operate “against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.”<sup>110</sup> It is particularly troubling when professional standards are used to quash student speech that offends. That is because the Court recognizes that “the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’”<sup>111</sup>

But what if the rationale for censorship is *not* merely to maintain conventions of decency, but instead to uphold professional standards of care applicable in a student’s prospective field of employment? The difficulty in answering this query and, in turn, reconciling the tension between institutional academic freedom and student First Amendment rights is exacerbated in cases like *Keefe* because the scope of speech rights in public university settings remains—much like the concept of academic freedom—unfortunately murky<sup>112</sup> and ambiguous.<sup>113</sup>

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<sup>107</sup> See *supra* Introduction.

<sup>108</sup> See *Healy v. James*, 408 U.S. 169, 180 (1972) (observing that “state colleges and universities are not enclaves immune from the sweep of the First Amendment”). See generally Kelly Sarabyn, *The Twenty-Sixth Amendment: Resolving the Federal Circuit Split over College Students’ First Amendment Rights*, 14 TEX. J. C.L. & C.R. 27 (2008) (providing an overview of the still-unsettled state of the First Amendment rights of public college and university students).

<sup>109</sup> *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 233 (2000).

<sup>110</sup> *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995).

<sup>111</sup> *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973).

<sup>112</sup> See Michael K. Park, *Restricting Anonymous “Yik Yak”: The Constitutionality of Regulating Students’ Off-Campus Online Speech in the Age of Social Media*, 52 WILLAMETTE L. REV. 405, 431 (2016) (describing a “murky picture of free speech jurisprudence on college campuses”).

<sup>113</sup> The problem here arises partly from the U.S. Supreme Court’s failure to squarely address the issue. In its decision of *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), affecting the First Amendment speech rights of high school students in school-sponsored fora, the majority observed that “[w]e need not now

The Supreme Court has never directly addressed a case, such as *Keefe*, involving “whether universities can regulate off-campus, online speech by students.”<sup>114</sup>

While the Supreme Court acknowledges that the “college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas,’ ”<sup>115</sup> a truly egalitarian, anything-goes marketplace of ideas may clash with academic freedom. This is especially true, former Yale Law School Dean Robert Post explains, for “academic freedom of research and inquiry.”<sup>116</sup> Specifically, Post asserts that “[u]niversities are essential institutions for the creation of disciplinary knowledge, and such knowledge is produced by discriminating between good and bad ideas. It follows that academic freedom cannot usefully be conceptualized as a marketplace of ideas.”<sup>117</sup> Put differently, in universities “[c]ompetence is defined by reference to scholarly or disciplinary standards. These standards cannot be determined by reference to public opinion.”<sup>118</sup> All ideas in academia, in other words, are not equally deserving of protection.<sup>119</sup>

The constitutional value of academic freedom, Post thus contends, requires deference to “professional scholarly standards”<sup>120</sup> to create expert knowledge and to determine competence of untenured faculty.<sup>121</sup> By extension, when universities impose professional standards on students to help determine their disciplinary competence upon possible graduation, it is not surprising that such exercises of

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decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.” *Id.* at 273 n.7.

<sup>114</sup> *Yeasin v. Durham*, 224 F. Supp. 3d 1194, 1202 (D. Kan. 2016).

<sup>115</sup> *Healy v. James*, 408 U.S. 169, 180 (1972) (quoting *Keyishian v. Bd. of Regents of State Univ. N.Y.*, 385 U.S. 589, 603 (1967)).

<sup>116</sup> ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 72 (2012).

<sup>117</sup> *Id.* at 62.

<sup>118</sup> *Id.* at 67.

<sup>119</sup> See Joseph J. Martins, *Tipping the Pickering Balance: A Proposal for Heightened First Amendment Protection for the Teaching and Scholarship of Public University Professors*, 25 CORNELL J.L. & PUB. POL’Y 649, 682 (2016) (“Indeed, it is the academy’s essence to distinguish ‘worthy ideas’ from ‘dull’ ones and, necessarily, to value some speakers more than others.”).

<sup>120</sup> POST, *supra* note 116, at 78. Post adds that “[t]he constitutional value of academic freedom depends upon the exercise of professional standards . . .” *Id.* at 80.

<sup>121</sup> As Post notes, untenured faculty “are closely scrutinized for competence,” while tenured faculty “are awarded a generous presumption of competence to facilitate the academic freedom necessary for creating new knowledge.” *Id.* at 73.

institutional academic freedom inhibit a completely unfettered marketplace of ideas. Professional standards designed to ensure competence, whether imposed on faculty or students, inevitably conflict with an any-idea-goes marketplace.

With this background on institutional academic freedom in mind, the next Part explores in greater detail the professional-code, student-speech cases of *Tatro v. University of Minnesota*<sup>122</sup> and *Oyama v. University of Hawaii*<sup>123</sup> noted in the Introduction.<sup>124</sup>

## II. DIGGING DEEPER INTO THE PROFESSIONAL-STANDARDS, STUDENT-SPEECH MUDDLE: CONSIDERING ALTERNATIVES TO THE HAZELWOOD STANDARD

This Part has two sections. Section A addresses the Supreme Court of Minnesota's decision in *Tatro v. University of Minnesota*, while Section B analyzes the United States Court of Appeals for the Ninth Circuit's ruling in *Oyama v. University of Hawaii*.

### A. *Tatro v. University of Minnesota*

As with Craig Keefe, Amanda Tatro's troubles at her institution stemmed from a series of Facebook posts ostensibly written to release and relieve emotional frustrations.<sup>125</sup> An undergraduate studying mortuary science at the University of Minnesota, Tatro took an anatomy laboratory course in which she dissected a human cadaver she humorously named Bernie,<sup>126</sup> based on the 1989 comedy film *Weekend at Bernie's*.<sup>127</sup> Taking to

<sup>122</sup> 816 N.W.2d 509 (Minn. 2012).

<sup>123</sup> 813 F.3d 850 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2520 (2016).

<sup>124</sup> See *supra* notes 44–53 and accompanying text (discussing *Oyama* and *Tatro*).

<sup>125</sup> *Tatro*, 816 N.W.2d at 511–13.

<sup>126</sup> *Id.* at 512–13.

<sup>127</sup> See *Tatro v. Univ. of Minn.*, 800 N.W.2d 811, 814 n.2 (Minn. Ct. App. 2011), *aff'd*, 816 N.W.2d 509 (Minn. 2012) (“‘Bernie’ was the name Tatro gave to the cadaver/donor she was assigned to work on, and is derived from the film *Weekend at Bernie's*.”); see also Mike Clark, *Lifeless ‘Bernie’ is Beyond Revival*, USA TODAY, July 6, 1989 (describing *Weekend at Bernie's* as “a one-joke movie about a ubiquitous stiff”—namely, a corpse named Bernie whom characters played by Andrew McCarthy and Jonathan Silverman try to make seem alive and “whose body keeps popping up everywhere”); Stephen Holden, *Spoofing Hamptons Life with a Mobster Murder*, N.Y. TIMES (July 5, 1989), <http://www.nytimes.com/1989/07/05/movies/review-film-spoofing-hamptons-life-with-a-mobster-murder.html> (reviewing *Weekend at Bernie's*, describing the plot in which Andrew McCarthy and Jonathan

Facebook to vent about a relationship breakup<sup>128</sup> and to cathartically engage<sup>129</sup> in what she alleged was “satirical commentary and violent fantasy about her school experience,”<sup>130</sup> Tatro made her corpse, Bernie, both the butt of jokes and the target of fictional violence. To wit, the content of Tatro’s four contested posts consisted of:

- “Get[ting] to play, I mean dissect, Bernie today. Let’s see if I can have a lab void of reprimanding and having my scalpel taken away. Perhaps if I just hide it in my sleeve . . . .”<sup>131</sup>
- “[L]ooking forward to Monday’s embalming therapy as well as a rumored opportunity to aspirate. Give me room, lots of aggression to be taken out with a trocar.”<sup>132</sup>
- “Who knew embalming lab was so cathartic! I still want to stab a certain someone in the throat with a trocar though. Hmm . . . perhaps I will spend the evening updating my ‘Death List #5’ and making friends with the crematory guy. I do know the code[.]”<sup>133</sup>
- “Realized with great sadness that my best friend, Bernie, will no longer be with me as of Friday next week. I wish to accompany him to the retort. Now where will I go or who will I hang with when I need to gather my sanity? Bye, bye Bernie. Lock of hair in my pocket.”<sup>134</sup>

Tatro’s self-described “sarcasm [and] morbid sense of humor”<sup>135</sup> in these posts contravened a Minnesota statute governing morticians and others involved in the business or

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Silverman’s characters attempt to make a corpse named Bernie “appear to be alive,” and noting that one effort to make Bernie seem alive at his Hamptons home is “to put sunglasses on him, wheel him out to the sun deck of his house and rig a device that raises an arm so he appears to be waving groggily to passers-by on the beach.”).

<sup>128</sup> Abby Simons, *State Justices Uphold Penalty for U Student*, STAR TRIB., June 21, 2012.

<sup>129</sup> Amanda Tatro explained during a disciplinary hearing held by the Campus Committee on Student Behavior:

[T]hat she uses humor and jokes to release anxiety and to stave off depression due to her unique life circumstances. Tatro suffers from a debilitating central nervous system disease, and she has served as the primary caretaker for her mother, who suffers from the effects of a traumatic brain injury.

*Tatro*, 816 N.W.2d at 514.

<sup>130</sup> *Id.* at 511.

<sup>131</sup> *Id.* at 512.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 512–13.

<sup>135</sup> *Id.* at 514.

practice of mortuary science.<sup>136</sup> Specifically, that statute forbids “unprofessional conduct,”<sup>137</sup> including failure “to treat with dignity and respect the body of the deceased.”<sup>138</sup> As interpreted by the Supreme Court of Minnesota, this means that “dignity and respect for the human cadaver constitutes an established professional conduct standard for mortuary science professionals.”<sup>139</sup>

But if Tatro was merely a student and not yet a professional, how and why did this standard apply to her? Because among the academic program rules for mortuary science that Tatro signed was one echoing this statutory language. Specifically, that rule required students to treat human cadavers “with utmost respect and dignity.”<sup>140</sup> Additionally, the laboratory rules Tatro agreed to follow provide “that ‘[c]onversational language of cadaver dissection outside the laboratory should be respectful and discreet’ and that ‘[b]logging about the anatomy lab or the cadaver dissection is not allowable.’”<sup>141</sup> In brief, the University of Minnesota tethered its own policies affecting the speech of students in the mortuary science program to a state statute<sup>142</sup> governing mortuary professionals in the Gopher State.

The University ultimately disciplined Tatro for her “disrespectful and unprofessional”<sup>143</sup> Facebook posts by, among other things, reducing her C+ mark in the anatomy laboratory course to a failing grade.<sup>144</sup> Tatro countered in her lawsuit “that the University violated her constitutional rights to free speech by disciplining her for Facebook posts.”<sup>145</sup>

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<sup>136</sup> MINN. STAT. ANN. § 149A.70 (West 2017).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Tatro*, 816 N.W.2d at 522.

<sup>140</sup> *Id.* at 516.

<sup>141</sup> *Id.*

<sup>142</sup> *See* MINN. STAT. ANN. § 149A.70 (West 2017).

<sup>143</sup> *Tatro*, 816 N.W.2d at 517.

<sup>144</sup> *Id.* at 513–15.

<sup>145</sup> *Id.* at 511.

In deciding whether the University flouted Tatro's First Amendment speech rights,<sup>146</sup> the Supreme Court of Minnesota initially noted it faced an issue of first impression with no established legal test.<sup>147</sup> Attempting to fill this legal lacuna, the University of Minnesota argued that *Hazelwood* provided the correct standard.<sup>148</sup> Tatro responded "that public university students are entitled to the same free speech rights as members of the general public with regard to Facebook posts."<sup>149</sup> Her position equating "the free speech rights of university students with those of the general public"<sup>150</sup> would have safeguarded Tatro's Facebook missives unless their content fell within one of the few categories of speech not protected by the First Amendment.<sup>151</sup>

The Supreme Court of Minnesota, however, rejected the standards proposed by both the University of Minnesota and Amanda Tatro. In their place, the Court fashioned its own rule: "[A] university may regulate student speech on Facebook that violates established professional conduct standards,"<sup>152</sup> provided

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<sup>146</sup> Although Tatro alleged violations of her free speech rights under both the First Amendment to the United States Constitution and Article I, Section 3 of the Minnesota Constitution, the Supreme Court of Minnesota looked "primarily to federal law for guidance" because the federal and state provisions are coextensive. *Id.* at 515–16.

<sup>147</sup> *See id.* at 517 ("The factual situation presented by this appeal has not been addressed in any published court decision—a university's imposition of disciplinary sanctions for a student's Facebook posts that violated academic program rules. Consequently, the constitutional standard that applies in this context is unsettled.").

<sup>148</sup> *See id.* at 518 ("[T]he University argues that it may constitutionally enforce academic program rules that are 'reasonably related to the legitimate pedagogical objective of training Mortuary Science students to enter the funeral director profession,' even when those rules extend to off-campus conduct.").

<sup>149</sup> *Id.* at 517.

<sup>150</sup> *Id.* at 520–21.

<sup>151</sup> The U.S. Supreme Court has carved out several varieties of unprotected expression. *See* *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (identifying categories of unprotected expression as incitement to violence, obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, fraud, true threats and "speech presenting some grave and imminent threat the government has the power to prevent"); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245–46 (2002) ("The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.").

<sup>152</sup> *Tatro*, 816 N.W.2d at 521.

the restrictions on a student's posts are "narrowly tailored and directly related to established professional conduct standards."<sup>153</sup> Defending this test, the Court reasoned that:

Tying the legal rule to established professional conduct standards limits a university's restrictions on Facebook use to students in professional programs and other disciplines where student conduct is governed by established professional conduct standards. And by requiring that the restrictions be narrowly tailored and directly related to established professional conduct standards, we limit the potential for a university to create overbroad restrictions that would impermissibly reach into a university student's personal life outside of and unrelated to the program.<sup>154</sup>

Professor R. George Wright criticizes this test as "a highly deferential form of mere minimum scrutiny."<sup>155</sup> That is in part because, Wright asserts, "the weight, proven or speculative, of the school's interest in restricting the student's speech appears to be of limited constitutional significance."<sup>156</sup> Instead of mandating that a particular level of importance be assigned to a professional standard before its speech-squelching imposition is justified, the *Tatro* test suggests "all binding professional standards are in this crucial respect created equal."<sup>157</sup>

Furthermore, Wright points out that the *Tatro* test ignores traditional First Amendment concerns about viewpoint-based censorship<sup>158</sup> and, instead, "assume[s] that the regulations in question target not speech viewpoints, but the student's failure to follow specified established professional conduct norms."<sup>159</sup> Indeed, the professional standard at issue in *Tatro*—treating a corpse with "dignity and respect"<sup>160</sup>—is indubitably viewpoint-

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> R. George Wright, *Standards of Professional Conduct as Limitations on Student Speech*, 11 FIRST AMEND. L. REV. 426, 428 (2013).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *See Wood v. Moss*, 134 S. Ct. 2056, 2061 (2014) ("The First Amendment, our precedent makes plain, disfavors viewpoint-based discrimination."); *see also* Martin H. Redish, *First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy*, 24 N. KY. L. REV. 553, 579–80 (1997) ("If there is one unbending principle of First Amendment theory and doctrine, it is that government may not shut off one side of a political debate because of disagreement with the position sought to be expressed.").

<sup>159</sup> Wright, *supra* note 155, at 429.

<sup>160</sup> MINN. STAT. ANN. § 149A.70 (West 2017).

centric. That's because one is only permitted to engage in *respectful speech* about cadavers. Conversely, *disrespectful speech* of the kind Amanda Tatro used is subject to censorship and punishment.

In a different article, Professor Wright criticizes the narrow tailoring facet of the *Tatro* test.<sup>161</sup> “The narrow tailoring requirement, importantly, can easily be interpreted with varying degrees of rigor,” he asserts.<sup>162</sup>

In stark contrast to the 2016 decision by the Eighth Circuit in *Keefe*, the Supreme Court of Minnesota rejected the *Hazelwood* test.<sup>163</sup> In doing so, it deemed *Hazelwood* inapplicable for several reasons. First, Amanda Tatro's Facebook posts were not sponsored by, and did not carry the imprimatur of, the University.<sup>164</sup> Second, the Court was concerned that the phrase “legitimate pedagogical concerns”<sup>165</sup>—the heart of *Hazelwood's* test—was so malleable and elastic that it easily could be stretched to sweep up vague values such as courtesy and respect for authority.<sup>166</sup> Additionally, the Court intimated that the wide latitude for censorship provided by *Hazelwood* might be abused by universities to censor Internet-based speech that was merely “offensive or controversial.”<sup>167</sup>

In applying its three-pronged test—first determining what the “established professional conduct standards”<sup>168</sup> are, and then deciding if the academic program rules at issue are both “narrowly tailored and directly related to”<sup>169</sup> those standards—the Supreme Court of Minnesota touched on institutional academic freedom, addressed earlier in this Article.<sup>170</sup> Specifically, the Court considered the deference owed to universities when fashioning a curriculum, opining that:

Although “a university's interest in academic freedom” does not “immunize the university altogether from First Amendment challenges,” courts have concluded that a university “has

<sup>161</sup> R. George Wright, *Post-Tinker*, 10 STAN. J. C.R. & C.L. 1, 9 (2014).

<sup>162</sup> *Id.*

<sup>163</sup> *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 518 (Minn. 2012).

<sup>164</sup> *Id.*

<sup>165</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

<sup>166</sup> *Tatro*, 816 N.W.2d at 518.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 521.

<sup>169</sup> *Id.*

<sup>170</sup> *See supra* Part I (discussing institutional academic freedom).



discretion to engage in its own expressive activity of prescribing its curriculum” and that it is appropriate to “defer[] to the university’s expertise in defining academic standards and teaching students to meet them.”<sup>171</sup>

This deferential genuflection to institutional academic freedom proved pivotal, with the Court noting that by “[g]iving deference to the curriculum decisions of the University, we conclude that the academic program rules imposed on Tatro as a condition of her access to human cadavers are directly related to established professional conduct standards.”<sup>172</sup> The rules were also narrowly tailored, according to Minnesota’s high court, because they:

[A]llow “respectful and discreet” conversational language of cadaver dissection outside the laboratory, but prohibit blogging about cadaver dissection or the anatomy lab. In this case, the University is not sanctioning Tatro for a private conversation, but for Facebook posts that could be viewed by thousands of Facebook users and for sharing the Facebook posts with the news media.<sup>173</sup>

This logic suggests that the size of the audience to which a student’s message is disseminated affects its protectability. Specifically, there is an inverse relationship—the larger the size of the audience, the smaller the chances are that the speech is protected by the First Amendment. Tatro clearly harmed her own case under this logic. That is because, after initially believing she was suspended from the program, she brought added attention to her situation—and to her posts—by seeking out local news organizations to cover her dispute.<sup>174</sup> In fact, she “appeared on local television stations.”<sup>175</sup> This move backfired for Tatro, as it sparked a wave of public backlash against her.<sup>176</sup>

Two other items proved important for the Supreme Court of Minnesota: the University’s contention that Tatro’s speech jeopardized the entire future of the mortuary science program and the rather lenient punishment Tatro suffered. As to the first point, the Court wrote that “the publicity surrounding Tatro’s

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<sup>171</sup> *Tatro*, 816 N.W.2d at 522 (quoting *Brown v. Li*, 308 F.3d 939, 950, 952 (9th Cir. 2002)).

<sup>172</sup> *Id.* at 522–23.

<sup>173</sup> *Id.* at 523.

<sup>174</sup> *Id.* at 513.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 523.

posts resulted in letters and calls to the Anatomy Bequest Program from donor families and the public regarding Tatro's poor judgment and lack of professionalism."<sup>177</sup> This, in turn, could have jeopardized the pipeline of dead bodies upon which the mortuary science program depends.<sup>178</sup> The program, in brief, would collapse without cadavers to sustain it.

As for the second point—the relative leniency of discipline—the Court reasoned that “Tatro was not expelled or even suspended from the Mortuary Science Program. The University allowed Tatro to continue in the Mortuary Science Program with a failing grade in one laboratory course.”<sup>179</sup> This suggests that the severity—or lack thereof—of the sanction imposed for breaching an academic program rule premised on a professional standard is relevant in determining the constitutionality of a university's action. In layman's terms, whether the punishment fits the supposed crime may affect a student's First Amendment challenge.

Finally, the Supreme Court of Minnesota intimated that the result in *Tatro* might be a rare occurrence, given the somewhat unusual traits of a mortuary science academic program. Here, the Court explained that its holding was:

[B]ased on the specific circumstances of this case—a professional program that operates under established professional conduct standards, a program that gives students access to donated human cadavers and requires a high degree of sensitivity, written academic program rules requiring the respectful treatment of human cadavers, and measured discipline that was not arbitrary or a pretext for punishing the student's protected views.<sup>180</sup>

Perhaps, then, the outcome in *Tatro* is an outlier. How many other academic programs, after all, depend on a steady supply of donated dead bodies and, by extension, the kindness and concern

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<sup>177</sup> *Id.*

<sup>178</sup> On this point, the Court reasoned:

[T]here would not be a Mortuary Science Program if people were not willing to donate their bodies after death to the Anatomy Bequest Program. Further, the consequences of any violation of trust caused by a student in the Mortuary Science Program would extend far beyond the Mortuary Science Program to other University programs that rely on donated human cadavers for their research and education missions.

*Id.* at 523–24.

<sup>179</sup> *Id.* at 524.

<sup>180</sup> *Id.*

of surviving relatives of the deceased? There are likely very few, other than those involving clinical anatomy dissection courses in programs such as physiology and medicine.

But a larger unanswered question raised by the passage quoted above is precisely what constitutes—in the parlance of Minnesota's high court—"a professional program"?<sup>181</sup> As this Article's Conclusion explains,<sup>182</sup> drawing a bright line between professional and nonprofessional programs is challenging. An undergraduate program in English, for example, might not appear to be professional, but for an English major hoping to teach English upon graduation it provides requisite professional knowledge.

Professor Emily Gold Waldman calls *Tatro* "a paradigmatic certification case"<sup>183</sup> because the University of Minnesota's "educational concerns were inextricably linked to certification concerns."<sup>184</sup> That is because "by allowing *Tatro* to continue in the Mortuary Science Program, the University of Minnesota would be facilitating her entry into the profession and essentially certifying her fitness for it."<sup>185</sup> Although Amanda *Tatro*'s Facebook posts did not bear the imprimatur of the University and thus were not governed by *Hazelwood*, "by ultimately granting *Tatro* a degree from the Mortuary Science Program, the University would have been placing its imprimatur on her as an appropriate entrant into this profession."<sup>186</sup>

In a tragic coda, Amanda *Tatro*, who ultimately graduated from the mortuary science program, died at age thirty-one in Minneapolis just a few days after the Supreme Court of Minnesota ruled against her.<sup>187</sup> She was employed at a funeral home when she died.<sup>188</sup> *Tatro* had wanted to appeal her case to the United States Supreme Court, according to her attorney Jordan Kushner,<sup>189</sup> who later represented Craig Keefe.<sup>190</sup> Her

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<sup>181</sup> *Id.*

<sup>182</sup> See *infra* Conclusion and accompanying text.

<sup>183</sup> Emily Gold Waldman, *University Imprimaturs On Student Speech: The Certification Cases*, 11 FIRST AMEND. L. REV. 382, 392 (2013).

<sup>184</sup> *Id.* (emphasis omitted).

<sup>185</sup> *Id.* at 393.

<sup>186</sup> *Id.* (emphasis omitted).

<sup>187</sup> Abby Simons, *U Grad in Facebook Case Dies*, STAR TRIB. (June 26, 2012, 10:59 PM), <http://www.startribune.com/u-grad-in-facebook-case-dies/160401465>.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

desire to keep fighting was unsurprising. As Joel Rand, Tatro's husband, told one reporter shortly after her death, "if she was wronged or perceived that she had been wronged, she would fight tooth-and-nail."<sup>191</sup>

Kushner, drawing a key distinction between private-time speech and workplace conduct, criticized the Supreme Court of Minnesota's reliance on professional standards:

The standard they cited was about showing respect toward cadavers. I think any common-sense reading of that standard refers to a person's clinical work. It's not referring to someone venting about their life experience and bringing in some of their experience from work, in connection with their venting, in their private time.<sup>192</sup>

With this analysis of *Tatro* in mind, the Article next turns to another professional standards case involving a very different factual scenario, namely, the Ninth Circuit's 2015 decision in *Oyama v. University of Hawaii*.<sup>193</sup>

#### B. *Oyama v. University of Hawaii*

Unlike *Keefe* and *Tatro*, *Oyama* was not spawned by off-campus Facebook posts replete with references to possible violent acts. Instead, as one newspaper article observed, "The primary trouble with Mark Oyama lay in views he had expressed in academic papers he wrote for education classes."<sup>194</sup>

Oyama had completed about one year of coursework in the University of Hawaii's Post-Baccalaureate Certificate in Secondary Education Program when his application to become a

<sup>190</sup> Katherine Lymn, *Student in Facebook Posts Case Found Dead*, MINN. DAILY (June 27, 2012, 12:00 AM), <http://www.mndaily.com/article/2012/06/student-facebook-posts-case-found-dead>; David Hanners, *Student Expelled from Brainerd Nursing School for Facebook Comments Sues*, TWIN CITIES PIONEER PRESS (Feb. 16, 2013, 11:01 PM), <http://www.twincities.com/2013/02/16/student-expelled-from-brainerd-nursing-school-for-facebook-comments-sues>.

<sup>191</sup> Lymn, *supra* note 190.

<sup>192</sup> Jane F. Pribek, *Court Backs University of Minnesota Student Sanction*, MINN. LAW. (June 22, 2012), <http://minnlawyer.com/2012/06/22/court-backs-university-of-minnesota-student-sanction>.

<sup>193</sup> See 813 F.3d 850 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2520 (2016).

<sup>194</sup> D.J. Tice, *Liberty Has a Way of Leaving Us Conflicted*, STAR TRIB. (Jan. 8, 2016, 6:38 PM), <http://www.startribune.com/liberty-has-a-way-of-leaving-us-conflicted/364705411>.

student teacher was denied.<sup>195</sup> The program's director, Jeffery Moniz, told Oyama the denial was based partly on views Oyama "expressed regarding students with disabilities and the appropriateness of sexual relations with minors [that] were deemed not in alignment with standards set by the Hawaii Department of Education, the National Council for the Accreditation of Teachers, and the Hawaii Teacher Standards Board."<sup>196</sup>

For instance, Oyama wrote in a paper for his "Educational Psychology: Adolescence and Education" class:

Personally, I think that online child predation should be legal, and find it ridiculous that one could be arrested for comments they make on the Internet. I even think that real life child predation should be legal, provided that the child is consensual [sic]. Basically from my point of view, the age of consent should be either 0, or whatever age a child is when puberty begins.<sup>197</sup>

Oyama later explained to the course's professor that he understood and agreed to comply with a state law requiring him to report such teacher-student relationships, but that he "still believed that such a 'consensual' relationship was not wrong."<sup>198</sup>

In terms of disabled students, Oyama expressed the belief "that nine of ten special education students he encountered were 'fakers.'"<sup>199</sup> He also questioned mainstreaming minors with learning disabilities into regular classrooms.<sup>200</sup>

Denying Oyama's student-teacher application based on such statements meant he could not teach in Aloha State public schools on either a half-time or full-time basis. That is because serving as a student teacher is a requisite step in Hawaii for obtaining a mandated teacher's license.<sup>201</sup>

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<sup>195</sup> *Oyama v. Univ. of Haw.*, No. 12-00137 HG-BMK, 2013 WL 1767710, at \*4–8 (D. Haw. Apr. 23, 2013), *aff'd*, 813 F.3d 850 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2520 (2016).

<sup>196</sup> *Id.* at \*35.

<sup>197</sup> *Oyama*, 813 F.3d at 856.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 857.

<sup>200</sup> *Id.* at 856–57.

<sup>201</sup> HAW. REV. STAT. ANN. § 302A-805 (West 2017) ("No person shall serve as a half-time or full-time teacher in a public school without first having obtained a license from the board under this subpart.").

Oyama sued the University of Hawaii, contending its “decision to deny his student teaching application violated his First Amendment right to freedom of speech.”<sup>202</sup> Searching for a rule to resolve that issue, the Ninth Circuit rejected applying all four of the U.S. Supreme Court’s decisions affecting the speech rights of public high school students.<sup>203</sup> As Judge Wardlaw wrote for a unanimous three-judge panel, “[t]his case presents no occasion to extend student speech doctrine to the university setting.”<sup>204</sup> Wardlaw deemed *Hazelwood* irrelevant because the denial of Oyama’s student-teacher application was not based on pedagogical concerns—the touchstone of the *Hazelwood* standard.<sup>205</sup> Rather, the refusal pivoted on the University’s “institutional responsibility”<sup>206</sup> to certify that only “students who meet the standards for the teaching profession”<sup>207</sup> are allowed to be educators in Hawaii’s public schools.

Furthermore, the Ninth Circuit rejected Mark Oyama’s argument that his case “was analogous to an employer’s act of retaliation”<sup>208</sup> and should, in turn, be controlled by government-employee speech cases such as *Pickering v. Board of Education of Township High School District 205*.<sup>209</sup> In rebuffing this assertion, Wardlaw initially noted that Oyama was a student, not a government employee.<sup>210</sup> Additionally, she suggested that Oyama would be hurting his own free-speech claim if

<sup>202</sup> *Oyama*, 813 F.3d at 860 (emphasis omitted).

<sup>203</sup> *E.g.*, *Morse v. Frederick*, 551 U.S. 393 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

<sup>204</sup> *Oyama*, 813 F.3d at 863.

<sup>205</sup> *Hazelwood*, 484 U.S. at 273.

<sup>206</sup> *Oyama*, 813 F.3d at 863.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 864.

<sup>209</sup> 391 U.S. 563 (1968). *Pickering* involved a public school teacher who was fired after a local newspaper published his letter criticizing the school district’s superintendent and the board of education over efforts to generate new revenue. *Id.* at 564–66. The letter included falsities. *Id.* at 570–72. However, the United States Supreme Court emphasized that its subject matter, school funding, was “of legitimate public concern.” *Id.* at 571. The Court ultimately ruled for the teacher, holding that “absent proof of false statements knowingly or recklessly made by him, a teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.” *Id.* at 574.

<sup>210</sup> *Oyama*, 813 F.3d at 866.

government-employee speech cases such as *Pickering* governed his case. Wardlaw reasoned here that Oyama, as a public university student:

[E]njoyed greater freedom to test his ideas, critique professional conventions, and develop into a more mature professional than he would as a government employee. To hold Oyama to the same standard as we hold public employees would deprive him of rights the First Amendment guarantees him as a public university student.<sup>211</sup>

After rejecting both the high school student-speech cases and government-employee decisions as controlling, the Ninth Circuit fashioned its own test to decide if the University's denial of Mark Oyama's student-teacher application violated his free speech rights. In doing so, Judge Wardlaw emphasized that *Oyama*, at its heart, was a case about certification<sup>212</sup> and that courts, in turn, "generally defer to certification decisions based on defined professional standards."<sup>213</sup> Wardlaw thus ruled that public universities may lawfully curb a student's speech in certification cases if three steps are satisfied:

1. The decision to deny certification was "directly related to defined and established professional standards"<sup>214</sup> rather than premised on "officials' personal disagreement with students' views."<sup>215</sup> The professional standards cannot be a university's own invention. Instead, they must be tethered to "external guideposts,"<sup>216</sup> such as "external standards, regulations, or statutes governing the profession."<sup>217</sup>

2. The decision was narrowly tailored to serve the underlying purpose or goal of certification for a profession, thus mitigating the danger that a university "transform[s] its limited discretion to evaluate a certification candidate's professional fitness into a [sic] open-ended license to inhibit the free flow of ideas at public universities."<sup>218</sup> Narrow tailoring also mandates that the

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<sup>211</sup> *Id.*

<sup>212</sup> *See id.* at 869 (specifying the Ninth Circuit was "focusing on the relationship between the University's decision and the standards of the profession in which Oyama sought certification").

<sup>213</sup> *Id.* at 867.

<sup>214</sup> *Id.* at 868.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 870.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 871.

statements at issue relate directly to the student's prospective profession<sup>219</sup> and occur "in the context of the certification program,"<sup>220</sup> rather than "outside this context or communicated to a broader audience,"<sup>221</sup> "such as [at] meetings with other students or protests to university officials."<sup>222</sup>

3. University officials exercised "reasonable professional judgment"<sup>223</sup> in denying certification, giving deference "to the University's decision because of its prerogative to evaluate professional competencies and dispositions . . . ."<sup>224</sup> This prong requires "a reasonable basis"<sup>225</sup> to deny certification based on a breached professional standard, such that not all violations necessarily provide a reasonable basis for denial.<sup>226</sup> Some infractions, in other words, may be too minor or trivial that their use to justify certification denial is unreasonable and merely provides a pretext for crushing speech based on a personal disagreement with its viewpoint.<sup>227</sup>

Applying this three-pronged test to the facts in *Oyama*, the Ninth Circuit found the first prong was satisfied because the two criteria on which the University based its decision—one relating to sexual relationships between adults and minors, the other pertaining to teaching students with disabilities—were "related directly to defined and established professional standards."<sup>228</sup> Specifically, the University tied these criteria for certifying student teachers to multiple external sources, including "standards established by state and federal law, the Hawaii Department of Education, the HTSB [Hawaii Teacher Standards

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<sup>219</sup> See *id.* at 872 ("[T]he University limited its focus to Oyama's statements that directly addressed the roles and responsibilities of aspiring secondary school teachers.").

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 876.

<sup>224</sup> *Id.* at 873.

<sup>225</sup> *Id.* at 872.

<sup>226</sup> See *id.* 872–73 ("For example, the statement, 'I hate cleaning my office' may be in tension with a professional standard to 'keep the office tidy' but may not be a reasonable basis to conclude that the speaker is not fit to enter the profession.").

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 868.



Board], and the University's national accreditation agency, the NCATE [National Council for Accreditation of Teacher Education]."<sup>229</sup>

As Judge Wardlaw explained, the University "compared Oyama's speech not to its own idiosyncratic view of what makes a good teacher, but rather to external guideposts that establish the skills and disposition a secondary school teacher must possess."<sup>230</sup> Oyama's statements demonstrated "that he had not internalized basic concepts embodied in the relevant external standards—the nature of sexual predation on children, for example, or the importance of including and supporting disabled students."<sup>231</sup>

In a nutshell, the University of Hawaii adopted benchmarks and standards for prospective teachers that were already well established by numerous reputable sources. Oyama's speech, in turn, indicated he likely could not meet those benchmarks were he admitted to the teaching profession. His speech, in other words, was a legally sufficient indicator or predictor of his future behavior. As Judge Wardlaw encapsulated this speech-forecasts-behavior logic chain, "[T]he University could look to what Oyama *said* as an indication of what he would *do* once certified."<sup>232</sup>

The Ninth Circuit also concluded the University met the second prong of the test because its basis for denying Oyama's student-teacher application was narrowly tailored to evaluating Oyama's fitness for his prospective profession.<sup>233</sup> Pivotal here was the court's determination that the University focused only on Oyama's statements that "related directly to his suitability for teaching."<sup>234</sup>

In brief, this prong involved examining the content of Oyama's statements that the University relied on in rejecting him and determining whether that content related directly to his suitability for teaching. As Judge Wardlaw explained, "rather than relying on any statement, no matter the subject, as a basis

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<sup>229</sup> *Id.* at 870. The author added parenthetical explanations for the abbreviations in the textual sentence that corresponds with this footnote.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 870–71.

<sup>232</sup> *Id.* at 870 (emphasis in original).

<sup>233</sup> *Id.* at 871–72.

<sup>234</sup> *Id.* at 872.

for its certification decision, the University limited its focus to Oyama's statements that directly addressed the roles and responsibilities of aspiring secondary school teachers."<sup>235</sup>

Intriguingly, the Ninth Circuit suggested that if Oyama had made the exact same statements in a *nonacademic context*,<sup>236</sup> such as in a Facebook post or at a political rally, his speech might have been safeguarded by the First Amendment. This, at least, is one way of interpreting Wardlaw's observation that:

There is no evidence that the University relied upon any statements Oyama may have made outside this [academic-program] context or communicated to a broader audience. Nor is there any evidence that the University attempted to restrict or take any adverse action in response to Oyama's expressive activities in other campus-related contexts, such as meetings with other students or protests to university officials. Beyond the limited context in which Oyama made the statements that supported the University's decision, Oyama was free to express his opinions *on any subject* he wished.<sup>237</sup>

Narrow tailoring under the second prong of the Ninth Circuit's test thus entails examining two facets of a student's statement—its *content* and the *context* in which it was communicated. To uphold a university's actions against a student, the content must directly relate to a student's ability to satisfy a professional standard, while the context in which that content is communicated must be within the academic program. In *Oyama*, the context factor tilted in favor of the University of Hawaii because its decision was based "only upon statements Oyama made in the context of the certification program—in the *classroom*, in written *assignments*, and *directly to the instructors* responsible for evaluating his suitability for teaching."<sup>238</sup>

Had the appellate courts in either *Keefe* or *Tatro* taken the Ninth Circuit's context-based approach to narrow tailoring, it is probable both Craig Keefe and Amanda Tatro would have

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<sup>235</sup> *Id.*

<sup>236</sup> *Id.* Wardlaw emphasized that the statements the University relied on were made "in the classroom, in written assignments, and directly to the instructors responsible for evaluating his suitability for teaching." *Id.*

<sup>237</sup> *Id.* (emphasis added).

<sup>238</sup> *Id.* (emphasis added).

prevailed. Their speech occurred on Facebook, far beyond the confines of classroom and laboratories, the pages of a class assignment, or a one-on-one discussion with a professor.

Finally, the Ninth Circuit turned to the third prong of its test, concluding the University exercised reasonable professional judgment in finding Mark Oyama unfit to teach, rather than reaching its decision based on a personal disagreement with his views.<sup>239</sup> The court was clear that not all violations of professional standards should be weighted equally and that some infractions are likely so unimportant as to not justify a university's actions against a student.<sup>240</sup> Delving into data regarding teacher-student sexual misconduct, the Ninth Circuit had no problem finding such misconduct was of serious concern and that, based on Oyama's statements, "[T]he University could reasonably conclude that Oyama would fail to perceive, or to exercise the vigilance needed to identify and report, potential or actual sexual abuse of students by other adults."<sup>241</sup> Similarly, Oyama's statements regarding students with learning disabilities were also of serious concern.<sup>242</sup>

The third factor thus entails analysis of the relative importance or gravity of a breached professional standard. The more serious the infraction cited by a university, the more likely its decision against a student will be upheld as an exercise of reasonable judgment. On the other hand, the less important the infraction cited by the university, the more likely its decision against a student will be struck down as unreasonable, with the infraction being merely a pretext for obscuring a personal disagreement with a student's viewpoint.<sup>243</sup> Additionally, the third prong's relaxed standard of "reasonable" professional judgment—rather than, say, "compelling" professional

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<sup>239</sup> *Id.* at 872–74.

<sup>240</sup> *See id.* at 872 (“[N]ot all inconsistencies between a candidate’s statements and defined and established professional standards provide a reasonable basis to conclude that the candidate is not suitable to enter the profession.”).

<sup>241</sup> *Id.* at 873.

<sup>242</sup> *See id.* at 873–74 (“The University could reasonably conclude that a candidate who expresses his view that special education students are ‘fakers’ to his professors would lack the professional disposition necessary to identify disabled students and teach all students, including those with disabilities.”).

<sup>243</sup> *See id.* at 872–73 (noting that in the absence of considering the importance of the professional standard violated, “the University could use professional standards as a pretext for decisions based on officials’ personal disagreement with the candidate’s views”).

judgment—reflects the deference courts grant universities under the umbrella of institutional academic freedom described earlier in Part I.<sup>244</sup>

In summary, “Denying Mark Oyama a teaching career didn’t violate his free-speech rights because his views evidence[d] an inability to meet applicable professional standards.”<sup>245</sup> The Ninth Circuit’s tack certainly seems like the most free-speech-friendly approach when considered against *Keefe’s* deployment of the vastly deferential *Hazelwood* test<sup>246</sup> and *Tatro’s* stretching of its own professional standards test to ensnare the off-campus, nonacademic forum of Facebook. As noted above, Judge Wardlaw indicated that had Mark Oyama’s statements been made in a nonacademic program context—one outside of the classroom and not in a response to a class assignment—he likely would have prevailed on his First Amendment claim.<sup>247</sup> Additionally, the fact that the Ninth Circuit considered the importance of the professional standards at issue and recognized that not all violations of such standards justify disciplining students is a minor victory for student free expression.<sup>248</sup>

But *Oyama* also has been roundly lambasted. Eric Seitz, Oyama’s attorney, called it “outrageous” that a student could be “essentially kicked out of his educational program” based on “expressions of opinions—however misguided—in a classroom discussion.”<sup>249</sup> UCLA Professor Eugene Volokh laments the chilling effect he sees the Ninth Circuit’s decision causing, contending that “[s]mart students will realize, when they hear about incidents such as Oyama’s, that they had better just avoid

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<sup>244</sup> Spurgeon, *supra* note 67. Judge Wardlaw explained this deference-influenced inquiry by opining that:

[W]e may defer to the University’s decision because of its prerogative to evaluate professional competencies and dispositions, not because of a blind faith in the University’s sense of what views are right or wrong. Consistent with this rationale for deference, we may uphold the University’s decision only if it reflects reasonable professional judgment about Oyama’s suitability for teaching.

*Oyama*, 813 F.3d at 873.

<sup>245</sup> Tice, *supra* note 194.

<sup>246</sup> See *supra* notes 28–33 and accompanying text (criticizing the *Hazelwood* test).

<sup>247</sup> *Supra* notes 236–237 and accompanying text.

<sup>248</sup> *Supra* note 240 and accompanying text.

<sup>249</sup> Associated Press, *Hawaii Man’s Opinions on Sex Keep Him from Becoming Teacher*, CBS NEWS (Dec. 29, 2015, 8:52 PM), <http://www.cbsnews.com/news/hawaii-man-opinions-on-sex-keep-him-from-becoming-teacher>.

expressing certain views, simply because of the risk that what happened to Oyama (and others like him) will happen to them.”<sup>250</sup> Referring to Oyama’s remarks questioning the mainstreaming of students with learning disabilities, Volokh queries, “Ask yourself: If you were a trainee teacher at the University of Hawaii, or at other universities, would you express any doubts to teachers or classmates about the orthodox views on educating the disabled?”<sup>251</sup>

With this discussion of *Tatro* and *Oyama* in mind, along with the Introduction’s analysis of *Keefe*, the Article next proposes and defends a standard to govern professional-standards cases at public colleges and universities.

### III. STRIKING A BETTER BALANCE BETWEEN THE INTERESTS: A PROPOSED TEST FOR PROFESSIONAL-STANDARDS CASES AFFECTING FREE EXPRESSION AT PUBLIC UNIVERSITIES

*Keefe*, *Tatro*, and *Oyama* illustrate three different approaches for determining when an external professional standard violates the First Amendment speech rights of public university students. But regardless of the test applied—be it the lax reasonableness standard embodied in *Hazelwood* and applied in *Keefe* to the seemingly more rigorous tack taken in *Oyama*—the students nonetheless lost in all three cases.

In fact, the only types of professional-standards cases students seem to win are those, such as *Ward v. Polite*<sup>252</sup> noted

<sup>250</sup> Eugene Volokh, Opinion, *Okay To Dismiss Professional School Students for Expressing Views . . . Deemed Not in Alignment with Standards Set by Government Authorities*, WASH. POST: VOLOKH CONSPIRACY (Dec. 29, 2015), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/12/29/okay-to-dismiss-professional-school-students-for-expressing-views-deemed-not-in-alignment-with-standards-set-by-government-authorities/?utm\\_term=.c78df7f66b47](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/12/29/okay-to-dismiss-professional-school-students-for-expressing-views-deemed-not-in-alignment-with-standards-set-by-government-authorities/?utm_term=.c78df7f66b47).

<sup>251</sup> *Id.*

<sup>252</sup> 667 F.3d 727 (6th Cir. 2012). In addition to *Ward*, another similar case involving the question of whether a university’s professional standard served merely as pretext for discriminating against a student’s religious-based First Amendment freedom is *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004). In this case, a Mormon student asserted a First Amendment right not to be compelled to speak certain words from a script during an acting training program. *Id.* at 1281–83. She found the words offensive, and their utterance would have conflicted with her religious beliefs. *Id.* at 1281. In reversing a district court’s grant of summary judgment for the university, the Tenth Circuit found “there is a genuine issue of material fact as to whether Defendants’ justification for the script adherence requirement was truly pedagogical or whether it was a pretext for religious discrimination.” *Id.* at 1293.

earlier,<sup>253</sup> where the very existence of a university policy based on a professional standard is itself cast into serious doubt, and a student's religious beliefs and the expression of them lie in the balance.<sup>254</sup> As the United States Court of Appeals for the Sixth Circuit bluntly admonished the University of Eastern Michigan in *Ward*, "A university cannot compel a student to alter or violate her belief systems based on a phantom policy as the price for obtaining a degree."<sup>255</sup> In brief, a student is likely to prevail only when it appears that a university cites a possibly nonexistent professional standard as a pretext for discriminating against that student's religious beliefs.<sup>256</sup>

But that does not help students such as Craig Keefe, Amanda Tatro, and Mark Oyama. None expressed a religious belief, and in each of their cases, a professional standard definitively existed that undergirded an academic program rule or criterion.

So what rule that balances a university's institutional academic freedom with a student's First Amendment speech rights should apply in public institution cases such as *Keefe*, *Tatro*, and *Oyama*? As noted earlier, *Hazelwood* is criticized for being far too relaxed of a standard,<sup>257</sup> yet it may be the very "difficulty of identifying alternative doctrine"<sup>258</sup> that helps to "explain the willingness of some courts to apply *Hazelwood* in the university context."<sup>259</sup> Unlike in *Keefe*, the courts in *Tatro* and *Oyama* rejected the high school-grounded *Hazelwood* test and instead attempted to fashion alternative doctrines.

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<sup>253</sup> See *supra* note 58.

<sup>254</sup> As the appellate court in *Ward* emphasized, the external ethics code cited by the university as justification for its discipline of the student actually permitted, rather than prohibited, that precise action that the student requested. *Ward*, 667 F.3d at 735.

<sup>255</sup> *Id.* at 738.

<sup>256</sup> The Sixth Circuit reasoned here that:

Although the university submits it dismissed *Ward* from the program because her request for a referral violated the ACA code of ethics, a reasonable jury could find otherwise—that the code of ethics contains no such bar and that the university deployed it as a pretext for punishing *Ward*'s religious views and speech.

*Id.* at 735.

<sup>257</sup> See *supra* notes 28–35 and accompanying text.

<sup>258</sup> Vikram David Amar & Alan E. Brownstein, *A Close-up, Modern Look at First Amendment Academic Freedom Rights of Public College Students and Faculty*, 101 MINN. L. REV. 1943, 1952 (2017).

<sup>259</sup> *Id.*

Drawing in part from the logic in *Oyama* but going beyond it, this Part proposes and defends a new test. This proffered four-pronged test holds that disciplining a student at either the undergraduate or graduate level for speech allegedly violating a professional standard is justified only if all of the following are met:

**1. The Precision Principle.** The professional standard, which must either be codified in a state or federal statute or carry the imprimatur of at least one leading, national-level professional trade association or professional interest group, survives a facial challenge for vagueness;

**2. The Essentiality Principle.** Adherence to the professional standard is essential—not merely useful or simply helpful—for individual professional success after graduation;

**3. The Contextuality Principle.** Imposition of the professional standard does not place an undue burden on the free-speech rights of the student in nonprofessional contexts and nonacademic settings; and

**4. The Proportionality Principle.** The severity of the imposed sanction is narrowly limited to encourage future adherence to the professional standard or, if the discipline is expulsion or termination from the program, that the student must have repeatedly engaged in expression indicating, by clear and convincing evidence, such as a documented prior warning going unheeded, he or she is unwilling or unable to uphold the standard.

What are the rationales for this test and each of its four prongs? The following paragraphs defend the proposed standard and flesh out some nuances.

Initially, the first prong of the test, the **precision principle**, features two facets. The first component requires judicial scrutiny to ensure that the professional standard cited by a university, in fact, exists and is widely accepted at a national level. The standard thus must be embodied either in a state or federal statute, such as the Minnesota law governing mortuary professionals in *Tatro*,<sup>260</sup> or be embraced by a national-level organization such as the American Nurses Association as in

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<sup>260</sup> MINN. STAT. ANN. § 149A.70 (West 2017).

*Keefe*.<sup>261</sup> But the mere identification of such a real, well-accepted professional standard does not end the inquiry under the precision principle.

The second component of the precision principle delves deeper into the words comprising the professional standard. This is especially vital in cases such as *Tatro* that involve, as one commentator argues, “vague, subjective, and nearly all-inclusive”<sup>262</sup> professional standards. Indeed, the relevant professional standard in *Tatro* pivoted on the meaning of the phrase “dignity and respect.”<sup>263</sup> The Minnesota statute governing the conduct of mortuary professionals from which that phrase emanates, however, fails to explicate its meaning.<sup>264</sup> This is extremely disconcerting because the words “dignity” and “respect” have been declared unconstitutionally vague in other standards-based contexts.<sup>265</sup>

Similarly, the Eighth Circuit in *Keefe* skirted serious issues of vagueness when it reasoned that the professional standards in that case were “*necessarily* quite general.”<sup>266</sup> It is one thing for nonbinding aspirational standards necessarily to be quite general.<sup>267</sup> It is a far different matter, however, to claim that a legal standard—recall that the aspirational standard in *Keefe* took on the same force and effect as a legal benchmark—is necessarily quite general.<sup>268</sup>

<sup>261</sup> See *supra* notes 5–9 and accompanying text.

<sup>262</sup> Ashley C. Johnson, Note, “*Narrowly Tailored*” and “*Directly Related*”: How the Minnesota Supreme Court’s Ruling in *Tatro v. University of Minnesota Leaves Post-Secondary Students Powerless to the Often Broad and Indirect Rules of Their Public Universities*, 36 HAMLINE L. REV. 311, 338 (2013).

<sup>263</sup> *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 522 (Minn. 2012).

<sup>264</sup> MINN. STAT. ANN. § 149A.70 (West 2017).

<sup>265</sup> See *Tucson Woman’s Clinic v. Eden*, 379 F.3d 531, 554–55 (9th Cir. 2004) (striking down a statute that required physicians to treat patients “with consideration, *respect*, and full recognition of the patient’s *dignity* and individuality” as unconstitutionally vague, and adding that “understandings of what ‘consideration,’ ‘respect,’ ‘dignity,’ and ‘individuality’ mean are widely variable, and they are not medical terms of art”) (emphasis added).

<sup>266</sup> *Keefe v. Adams*, 840 F.3d 523, 532 (8th Cir. 2016) (emphasis added).

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*



By necessity, a legal standard must *not* be “quite general.”<sup>269</sup> That is because of the dangerous chilling effect and self-censorship of expression that vague terms cause.<sup>270</sup> A statute, therefore, is unconstitutionally vague if it “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.”<sup>271</sup> In other words, vague laws pose two dangers: They may “lead citizens, seeking to avoid prosecution but unsure of the prohibition’s scope, to censor their own speech, forgoing expression the law might plausibly be read to permit,”<sup>272</sup> and they invite “arbitrary and biased enforcement.”<sup>273</sup> The notion of arbitrary and biased enforcement, of course, taps into concerns about the pretextual use of professional standards to stifle student expression.<sup>274</sup>

In summary, the threshold requirement of the test proposed here—the precision principle—initially requires judicial identification of a genuine, well-recognized and accepted professional standard, and then entails examination of that standard’s terms to ensure they carry clear, precise definitions that afford students fair notice of their meaning. Vague professional standards not only can chill student expression, but can provide shelter for administrators to abuse their enforcement in pretextual fashion.

If a university fails to clear the first prong of the proposed test, then its punishment of a student is rendered unconstitutional and there is no need to consider the remaining three requirements. The four-part proposed test, in other words, requires a university to meet all four prongs before a student’s discipline is deemed constitutional.

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<sup>269</sup> *Id.*

<sup>270</sup> *See* *Citizens United v. FEC*, 558 U.S. 310, 324 (2010) (citing *Hill v. Colorado*, 530 U.S. 703, 732 (2000)) (observing that “vague laws chill speech”); *see also* ROBERT TRAGER ET AL., *THE LAW OF JOURNALISM AND MASS COMMUNICATION* 5 (5th ed. 2016) (“Vague laws relating to speech are unacceptable because they may chill or discourage speech by individuals who may choose not to speak rather than risk running afoul of an unclear law.”).

<sup>271</sup> *United States v. Williams*, 553 U.S. 285, 304 (2008).

<sup>272</sup> Jonathan Weinberg, *Vagueness and Indecency*, 3 VILL. SPORTS & ENT. L.J. 221, 225 (1996).

<sup>273</sup> *Id.*

<sup>274</sup> *Supra* notes 227, 243 and accompanying text.

Assuming, arguendo, that the professional standard a student allegedly violated passes constitutional muster under the void-for-vagueness doctrine, the analysis shifts to the **essentiality principle**. This prong mandates that compliance with the professional standard a student purportedly violated is essential for individual professional success following graduation. The word “essential” is critical; it means “necessary” and it forces the judiciary to focus on the relative weight or importance of the standard in question.

If adherence to the standard is merely useful or helpful for professional success, rather than necessary, then this fails to satisfy the essentiality criterion. On the other hand, if violating a professional standard would subject an individual—after graduation and once in the profession—to either suspension or expulsion by a licensing body governing the profession, then courts should presumptively consider conformance to the standard to be essential. For nonlicensed professions, such as journalism, courts should consider, based on expert testimony, the degree to which failure to adhere to the standard would harm or jeopardize an individual’s ability to obtain full-time, long-term employment with well-regarded professional employers. These suggestions for licensed and nonlicensed professionals add meaning and teeth to the term essentiality, providing criteria by which it is measured.

Furthermore, and by way of analogy, the meaning of “essential” should be considered by courts to be akin to a “compelling interest”<sup>275</sup> used in the strict scrutiny standard of judicial review that applies to content-based restrictions on speech.<sup>276</sup> A compelling interest is defined, variously, as one of

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<sup>275</sup> See *McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014) (opining that under strict scrutiny, a statute “must be the least restrictive means of achieving a *compelling state interest*”) (emphasis added).

<sup>276</sup> See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015) (noting that “content-based restrictions on speech” are permissible “only if they survive strict scrutiny,” and adding that strict scrutiny requires the government to prove that the regulation in question “furthers a *compelling interest* and is narrowly tailored to achieve that interest”) (emphasis added); *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 799 (2011) (asserting that because a California law limiting minors’ access to violent video games “imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a *compelling government interest* and is narrowly drawn to serve that interest”) (emphasis added). See generally R. George Wright, *Electoral Lies and the Broader Problems of Strict Scrutiny*, 64 FLA. L. REV. 759, 777 (2012).

the highest order, an overriding interest and one of unusual importance.<sup>277</sup> This constitutes a higher threshold than the “significant” governmental interest typically necessary to sustain a content-neutral statute under intermediate scrutiny.<sup>278</sup> As Professor R. George Wright explains, “In contrast to the most typical approaches to speech restrictions categorized as content-based, content-neutral regulations commonly receive less exacting, less demanding, mid-level judicial scrutiny. There are certainly variations among the content-neutral test formulations, but the most broadly applied formulations seem to require a significant or substantial government interest.”<sup>279</sup>

The impetus underlying the essentiality principle—that not all professional standards are of equal importance and that, in fact, violation of some standards fails, under the First Amendment, to justify any discipline of a student—reflects the Ninth Circuit’s decision in *Oyama*. As addressed earlier,<sup>280</sup> the Ninth Circuit opined that:

[N]ot all inconsistencies between a candidate’s statements and defined and established professional standards provide a reasonable basis to conclude that the candidate is not suitable to enter the profession. For example, the statement, “I hate cleaning my office” may be in tension with a professional standard to “keep the office tidy” but may not be a reasonable basis to conclude that the speaker is not fit to enter the profession.<sup>281</sup>

Universities, based on the principle of institutional academic freedom,<sup>282</sup> must be given some modest level of deference when arguing that a professional standard is essential or necessary for success in a given profession. Courts, however, must scrutinize whether adherence to the standard, in fact, truly is essential for success or merely is useful or helpful, with the latter determination failing to justify discipline. Essentiality also

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(identifying strict scrutiny as having “two prongs” and specifying the first prong as requiring a “*compelling government interest*” and the second prong as requiring “sufficiently narrow tailoring”) (emphasis added).

<sup>277</sup> See *United States v. Marcavage*, 609 F.3d 264, 287 (3d Cir. 2010).

<sup>278</sup> *McCullen*, 134 S. Ct. at 2529.

<sup>279</sup> R. George Wright, *Content-Neutral and Content-Based Regulations of Speech: A Distinction That Is No Longer Worth the Fuss*, 67 FLA. L. REV. 2081, 2084 (2015) (footnote omitted).

<sup>280</sup> See *supra* notes 226–227 and accompanying text.

<sup>281</sup> *Oyama v. Univ. of Haw.*, 813 F.3d 850, 872–73 (9th Cir. 2015).

<sup>282</sup> See *supra* Part I (addressing institutional academic freedom).

guards against the pretextual use of professional standards to stifle speech. As the Ninth Circuit remarked in *Oyama*, without an inquiry into whether adherence to the standard truly makes one unfit to enter a profession, a university “could use professional standards as a pretext for decisions based on officials’ personal disagreement with the candidate’s views.”<sup>283</sup>

If a university fails to clear the essentiality hurdle, then its discipline of a student based on speech violates the First Amendment. But if both the precision and essentiality prongs are satisfied, then the analysis moves to the **contextuality principle**. This factor concentrates on whether the allegedly offending speech was communicated in an academic or professional setting, on the one hand, or whether it was expressed in a nonacademic, nonprofessional venue, such as on Twitter or Facebook. The Ninth Circuit in *Oyama*, for example, took context directly into account.<sup>284</sup> As Judge Wardlaw wrote, “Beyond the limited context in which *Oyama* made the statements that supported the University’s decision, *Oyama* was free to express his opinions on any subject he wished.”<sup>285</sup> The courts in both *Keefe* and *Tatro*, however, stretched the authority of public universities off campus to the decidedly nonprofessional and nonacademic setting of Facebook.<sup>286</sup>

The *Hellerstedt* majority’s interpretation of the undue burden standard adds rigor to the test while removing deference granted to legislative bodies.<sup>287</sup> As Dean Erwin Chemerinsky explains, it requires the judiciary to “carefully scrutinize laws restricting abortion that are adopted with the purported justification of protecting women’s health. The majority rejected judicial deference to legislatures.”<sup>288</sup> Furthermore, in determining if an undue burden exists, “it is for the judiciary to balance the justifications for the restrictions against their effect

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<sup>283</sup> *Oyama*, 813 F.3d at 873.

<sup>284</sup> See *supra* notes 238 and 247.

<sup>285</sup> *Oyama*, 813 F.3d at 872.

<sup>286</sup> See *supra* notes 13–17 and 131–134 (describing the Facebook posts for which Craig Keefe and Amanda Tatro were, respectively, disciplined).

<sup>287</sup> See Elizabeth Price Foley, *Whole Woman’s Health and the Supreme Court’s Kaleidoscopic Review of Constitutional Rights*, 2015–2016 CATO SUP. CT. REV. 153, 175 (describing how the majority’s reasoning in *Hellerstedt* both stripped deference from the legislature and moved the undue burden standard away from constituting a rational basis standard of review and closer to a strict scrutiny analysis).

<sup>288</sup> Erwin Chemerinsky, *Everything Changed: October Term 2015*, 19 GREEN BAG 2d 343, 355 (2016).

on the ability of women to have access to abortions.”<sup>289</sup> In other words, the undue burden test, at least as used by the majority in *Hellerstedt*, entails a “balancing burden-benefit analysis.”<sup>290</sup>

As applied to the First Amendment right of free speech in professional-standards cases, the undue burden analysis forces courts not simply to evaluate the benefits that adherence to professional standards purportedly bring, but also to weigh those benefits against the burdens imposed on the free-speech rights of students, especially when they are speaking in nonacademic and nonprofessional fora. In considering those burdens, courts should recognize that: (1) Speech can serve beneficial, personal interests for students by cathartically relieving stress from the pressures of academic study, as both Craig Keefe and Amanda Tatro asserted,<sup>291</sup> and (2) Students should have the right to separate their personal lives from their aspiring professional ones, such that it unduly burdens their First Amendment rights to hold them accountable for violating professional standards in *any setting at any time*. In brief, the more a university attempts to extend the reach of professional standards beyond the confines of classrooms, laboratories, and course-required assignments and projects, the greater the likelihood is that the burden imposed on speech is undue.

In a nutshell, a burden levied on speech by a professional standard might not be considered undue when narrowly confined to either classroom speech or course-related projects and assignments. Yet it might be undue when applied to students who, while *off campus*, on their *own time* and using their *own computers*, post messages on their personal Twitter accounts. The deference granted by courts to universities in this balancing equation, in turn, must decrease when those institutions stretch the reach of professional standards to extracurricular scenarios.

This is not to say that all applications of professional standards in off-campus, nonacademic settings are necessarily or *per se* undue. Rather, it means that the deference accorded universities under the concept of institutional academic freedom

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<sup>289</sup> *Id.*

<sup>290</sup> Paul Baumgardner & Brian Miller, *On Commonsense Inferences and Radical Indeterminacies: The Murky Future of Abortion Law After Whole Woman's Health*, 67 SYRACUSE L. REV. 679, 694 (2017).

<sup>291</sup> See *supra* notes 12 and 128–129 (explaining the reasons asserted, respectively, by Craig Keefe and Amanda Tatro for why they engaged in the speech that led to their discipline).

must diminish when they choose to apply professional standards in such venues. Recall that the *Hellerstedt* majority's use of the undue burden standard stripped lawmakers of deference and, instead, focused more on the actual evidence offered in judicial settings.<sup>292</sup> The same holds true here in the professional-standards cases.

If a university clears the contextuality prong, then the fourth part of the proposed test, the **proportionality principle**, comes into play. This principle is premised on the reality that students—being students, *not* professionals—will sometimes make mistakes when they express themselves and that such blunders, in turn, should presumptively be treated by universities as teachable moments—opportunities for learning and improvement, rather than for dismissal or expulsion. Thus, the proportionality principle requires courts to examine the nature of the punishment meted out by universities, much as the Supreme Court of Minnesota did in *Tatro*.<sup>293</sup>

Specifically, this prong mandates one of either two things for the punishment to be constitutional. First, if the sanction is something less than expulsion or termination, then the sanction's severity must be narrowly limited to encourage future adherence to the professional standard. A stiff penalty, in other words, may be more discouraging to a student than it is a lesson. Second, if a university expels or terminates a student—the academic equivalent of the death penalty—then the student must have repeatedly engaged in expression indicating, by clear and convincing evidence, such as a documented prior warning going unheeded, she is unwilling or unable to uphold the professional standard were she to graduate. The second facet imposes a clear and convincing evidentiary standard—a threshold higher than a mere preponderance of the evidence—given the gravity of the discipline of expulsion or termination.<sup>294</sup> It also requires the

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<sup>292</sup> *Supra* notes 287–288 and accompanying text.

<sup>293</sup> See *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 524 (Minn. 2012) (noting that “courts have considered the seriousness of the consequences in analyzing First Amendment claims,” and pointing out that “*Tatro* was not expelled or even suspended from the Mortuary Science Program. The University allowed *Tatro* to continue in the Mortuary Science Program with a failing grade in one laboratory course”).

<sup>294</sup> As one article describes it:

The Supreme Court has delineated three standards, or levels, of proof: the minimum level, preponderance of the evidence, for typical civil cases; the

student to have engaged in the speech on at least more than one occasion—the use of the term “repeatedly” is key—for expulsion or termination to be constitutional. In brief, the greater the penalty, the greater the hurdles a university must clear to permissibly enforce it.

Only if a public college or university satisfies all four prongs—precision, essentiality, contextuality and proportionality—does its use of professional standards to discipline students for their otherwise First Amendment-protected speech pass constitutional muster under this proposed test. Regardless, however, of the actual test or tests that future courts apply in professional-standards cases, a possibly outcome-determinative factor in any dispute is the degree of deference the judiciary extends to universities under the label of institutional academic freedom.<sup>295</sup>

The contextuality principle mandates that a university's imposition of a professional standard must not place an undue burden on the free-speech rights of the student in nonprofessional contexts and nonacademic settings. The undue burden concept borrows from the Supreme Court's abortion-restriction jurisprudence and, in particular, from the Court's 2016 opinion in *Whole Woman's Health v. Hellerstedt*.<sup>296</sup> Writing for the five-justice majority, Stephen Breyer observed in *Whole Woman's Health* that an undue burden on the constitutionally safeguarded right of a woman to have an abortion exists when a restriction imposes a substantial obstacle.<sup>297</sup> Breyer stressed that the undue burden standard “requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.”<sup>298</sup> The standard also places

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intermediate level, clear and convincing evidence, for certain civil cases such as those involving fraud or civil commitment for mental illness; and the high level for criminal cases, proof beyond a reasonable doubt.

Herman N. (Rusty) Johnson, Jr., *The Evolving Strong-Basis-in-Evidence Standard*, 32 BERKELEY J. EMP. & LAB. L. 347, 357 (2011).

<sup>295</sup> Deference may be defined as “any situation in which a second decisionmaker is influenced by the judgment of some initial decisionmaker rather than examining an issue entirely de novo.” Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 U. CHI. L. REV. 643, 652 (2015). In the professional-standards cases, the “second decisionmaker” is a court, while the “initial decisionmaker” is a college or university.

<sup>296</sup> 136 S. Ct. 2292, 2309–10 (2016).

<sup>297</sup> *Id.* at 2300.

<sup>298</sup> *Id.* at 2309.

“considerable weight upon evidence and argument presented in judicial proceedings.”<sup>299</sup> It is clear, for example, that the deference afforded the University of Michigan Law School over its admissions policies in *Grutter v. Bollinger*<sup>300</sup> “performed real work.”<sup>301</sup> As Professor Paul Horwitz writes, “[I]t is hard to believe that the Court would have left the Law School so free a hand to shape its admissions policies had it not proceeded from a posture of deference to university decision making.”<sup>302</sup> He adds that *Grutter* reveals “the Court stands by its prior statements singling out universities as institutions uniquely worthy of substantial deference. Certainly the Law School was accorded deference far beyond that granted to any other institution whose affirmative action policies had come before the Court since *Bakke*.”<sup>303</sup>

Analyzing the deference deployed by the Supreme Court in numerous niches of First Amendment law other than academic freedom, Professor Clay Calvert and Justin Hayes assert that:

Like a spigot, deference can be turned on and off by the Court, and even when it is turned on, it can be made either to flow freely and with full force or it can be reduced to a mere trickle. It is precisely such subjectivity and flexibility that makes it a critical concept to understand. Deference amounts to a judicial wildcard, as it were, that justices can employ . . . .<sup>304</sup>

In brief, when it comes to institutional academic freedom and professional-standards cases affecting free speech, courts should be reticent to grant vast deference to universities lest they too readily quash students’ First Amendment rights. No matter how ostensibly rigorous and stringent a legal standard appears when spelled out on paper, it is in the standard’s courtroom application where judicial restraint must be exercised in providing universities with deference to ensure that the rigor and stringency are more than superficial.

With the proposed four-part test in mind, this Article now turns to the Conclusion.

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<sup>299</sup> *Id.* at 2310.

<sup>300</sup> 539 U.S. 306, 328 (2003).

<sup>301</sup> Horwitz, *supra* note 91, at 496.

<sup>302</sup> *Id.* at 496–97.

<sup>303</sup> *Id.* at 496.

<sup>304</sup> Clay Calvert & Justin B. Hayes, *To Defer or Not to Defer? Deference and Its Differential Impact on First Amendment Rights in the Roberts Court*, 63 CASE W. RES. L. REV. 13, 53 (2012).



## CONCLUSION

It is time for the United States Supreme Court to hear a case pitting the First Amendment speech rights of public university students against the institutional academic freedom of universities to impose speech-restrictive professional standards of care. Sadly, the Court passed on such an opportunity in *Keefe* by denying a petition for a writ of certiorari in April 2017.<sup>305</sup> It also declined to hear *Oyama* in June 2016.<sup>306</sup> Amanda Tatro, who was considering petitioning the Court, died before having the chance to do so.<sup>307</sup>

Given the regularity with which such cases percolate up through court systems and the fact that public universities “increasingly regulate expression protected under the First Amendment by incorporating regulations developed by third parties,”<sup>308</sup> it is important for the Supreme Court to clarify the metes and bounds for using professional standards in higher education when those standards detrimentally impact students’ First Amendment rights. In a nutshell, citing external professional standards is, Professor Mary-Rose Papandrea explains, “[a]n increasingly popular argument for the power of universities to limit their students’ speech rights . . . .”<sup>309</sup>

This Article proposed and defended in Part III one possible test for professional-standards cases that the Supreme Court might consider if and when it does hear such a case. The suggested test is tailored to strike a better balance between universities’ institutional academic freedom and students’ First Amendment speech rights.

Because the Supreme Court has not embraced a doctrinal test for resolving professional-standards cases, it seems that a best practice for all public university programs enforcing such standards is to provide clear, unambiguous, and written notice to prospective undergraduate and graduate students regarding how those standards might detrimentally affect their First Amendment right of free speech. Furthermore, it is undoubtedly reasonable that such fair notice be provided to students *before*

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<sup>305</sup> *Keefe v. Adams*, 137 S. Ct. 1448 (2017).

<sup>306</sup> *Oyama v. Univ. of Haw.*, 136 S. Ct. 2520 (2016).

<sup>307</sup> *Supra* notes 187–191 and accompanying text.

<sup>308</sup> Andrew R. Kloster, *Speech Codes Slipping Past the Schoolhouse Gate: Current Issues in Students’ Rights*, 81 UMKC L. REV. 617, 628 (2013).

<sup>309</sup> Papandrea, *supra* note 57, at 1853.

they enroll in a degree-granting program, be it undergraduate or graduate, so that they fully understand the risks of signing away their constitutional rights and making informed choices when selecting a major. In fact, a genuinely open and fair process would mandate that universities specify in writing the precise professional standards that may eviscerate First Amendment rights and, in turn, require students to affirmatively sign an agreement acknowledging they understand these risks. The principle of notice-and-consent, in brief, is paramount under such a best-practice scenario.

But how likely is it that a college student will be held to professional standards that quash free speech rights? One might, for instance, argue that the cases examined here are cabined and confined to only students seeking professional degrees or who study in what the Supreme Court of Minnesota in *Tatro* called “a professional program.”<sup>310</sup> But as one commentator rather wryly points out, “[t]hat a student is a professional student (as opposed to what, we might ask—an ‘academic’ or even ‘real’ student) would seem to offer a distinction unworthy of a new exception to First Amendment protections.”<sup>311</sup> Indeed, the scope of the cases examined in this Article readily extends beyond programs that prepare students for licensed professions.

The following example illustrates exactly this point. Journalism is a profession but it does not require a government license or state certification—let alone a college degree in journalism—to practice in the United States.<sup>312</sup> Yet, could a journalism department enforce the ethical tenets of the Society of Professional Journalists (“SPJ”)<sup>313</sup> against its undergraduate

<sup>310</sup> 816 N.W.2d 509, 524 (Minn. 2012).

<sup>311</sup> Bush, *supra* note 54, at 589–90.

<sup>312</sup> As Professor Barbie Zelizer explains, “the idea of journalism as a profession [persists] . . . . Many quarters of the academy readily include the norms, values, and practices associated with professionalism as part of their curriculum, and concerns over professionalism remain implicit in much of the journalistic trade literature.” Barbie Zelizer, *Definitions of Journalism*, in *THE PRESS* 66, 73 (Geneva Overholser & Kathleen Hall Jamieson eds., 2005). See generally LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 1 (1991) (observing that in the United States, “[t]he press is not licensed, as it was in seventeenth-century England”); Philip Meyer, *Journalism’s Road to Becoming a Profession*, 56 *NIEMAN REPS.* 107, 107 (2002) (describing the qualities that make journalism a profession, and suggesting that “[j]ournalism education is a form of certification”).

<sup>313</sup> See generally *Society of Professional Journalists Code of Ethics*, SOC’Y OF PROF. JOURNALISTS, <https://www.spj.org/ethicscode.asp> (last updated Sept. 6, 2014, 4:49 PM).

majors and, in turn, punish them for their off-campus, Facebook-posted speech, akin to the cases of *Keefe* and *Tatro*? This may not be as farfetched as it sounds.

First, the accrediting standards of the Accrediting Council on Education in Journalism and Mass Communications ("ACEJMC") include a criterion that graduates of ACEJMC-accredited programs should "demonstrate an understanding of *professional ethical principles*."<sup>314</sup> More than 100 colleges and universities are accredited by ACEJMC and thus must adhere to this criterion.<sup>315</sup> Therefore, it is neither unthinkable nor unreasonable to require journalism majors in these institutions to sign a statement agreeing to comply with SPJ's Code of Ethics.

That code provides, in one key part, that "[e]thical journalism treats sources, subjects, colleagues and members of the public as human beings *deserving of respect*."<sup>316</sup> Respect, as noted earlier, was a central concept underlying the professional standards in both *Keefe*<sup>317</sup> and *Tatro*.<sup>318</sup>

Now imagine an undergraduate journalism major in an ACEJMC-accredited program at a public university who interviews a source for a news story for her independent newspaper<sup>319</sup> about a local trailer park that is being razed to make room for a Whole Foods market. The source is a man with a sixth-grade education who lives in the trailer park and exists on welfare and with the assistance of the Supplemental Nutrition Assistance Program, better known as the food-stamp system.<sup>320</sup> During the interview, the source demonstrated poor grammar and verbal skills and was deemed inarticulate by the student-journalist.

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<sup>314</sup> *Nine Accrediting Standards*, ACCREDITING COUNCIL ON EDUC. IN JOURNALISM AND MASS COMM., <http://www.acejmc.org/policies-process/nine-standards> (last visited Feb. 4, 2018) (emphasis added).

<sup>315</sup> *See Accredited/Reaccredited*, ACCREDITING COUNCIL ON EDUC. IN JOURNALISM AND MASS COMM., <http://www.acejmc.org/accreditation-reviews/accredited-programs/accreditedreaccredited> (last visited Feb. 4, 2018) (listing the ACEJMC-accredited institutions).

<sup>316</sup> *Society of Professional Journalists Code of Ethics*, *supra* note 313 (emphasis added).

<sup>317</sup> *See supra* note 7 and accompanying text.

<sup>318</sup> *See supra* notes 137–139 and accompanying text.

<sup>319</sup> The term "independent" is used here to denote that the newspaper is not sponsored by, advised by, or funded by the college or journalism program.

<sup>320</sup> *See generally Supplemental Nutrition Assistance Program*, U.S. DEP'T OF AGRIC. FOOD AND NUTRITION SERV., <https://www.fns.usda.gov/snap/supplemental-nutrition-assistance-program-snap> (last updated Jan. 30, 2017).

Later that night, while at home and using her own computer, the student-journalist mockingly posts the following to Facebook: “*Just interviewed a total trailer-park trash looooooooooser for a story today. He’s one dude who definitely won’t be shopping at the new Whole Foods. Bet he’d spell it Hole Foods! LOL.*” The post is brought to the attention of the chair of the journalism department. If the journalism department requires students to comply with SPJ’s Code of Ethics, it would seem—especially under the logic of either *Keefe* or *Tatro*—that the chair could lawfully discipline the student for her off-campus Facebook post about the source. That is because the student, in contravention of the ethical tenet quoted above,<sup>321</sup> failed to treat her source as a human being deserving of respect.

This ethical tenet for professional journalists, when coupled with ACEJMC’s accrediting standard requiring graduates to “demonstrate an understanding of professional ethical principles,”<sup>322</sup> suggests a court like that in *Keefe*, which applied *Hazelwood*’s standard, would likely uphold disciplining the student. Mandating that students adhere to the strictures of SPJ’s Code of Ethics would seem, per *Hazelwood*, to be “reasonably related to legitimate pedagogical concerns.”<sup>323</sup> The SPJ provision admonishing that sources be treated with respect neatly tracks the tenet of the American Nurses Association’s Code of Ethics at issue in *Keefe* providing that a nurse treats colleagues, employees, assistants, and students with respect and compassion.<sup>324</sup>

All of this suggests that the impact of cases such as *Keefe*, *Tatro*, and *Oyama* stretch beyond professions that require government certification. Business majors, for instance, might be held to professional ethics standards,<sup>325</sup> even though no professional certification is required to manage or work in a

<sup>321</sup> See *supra* note 316 and accompanying text.

<sup>322</sup> *Nine Accrediting Standards*, *supra* note 314.

<sup>323</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

<sup>324</sup> See AM. NURSES ASS’N, CODE OF ETHICS FOR NURSES, *supra* note 6, at 4.

<sup>325</sup> The University of Florida’s Warrington College of Businesses houses an ethics center, which stresses that “business ethics lies at the core of a productive market system, and that a prosperous and just society presumes that people accept responsibility and discharge duties, that they honor commitments, that they deal honestly with others, and that they respect the dignity and integrity of fellow human beings.” *Elizabeth B. & William F. Poe, Sr. Business Ethics Center*, U. OF FLA. WARRINGTON C. OF BUS., <http://warrington.ufl.edu/centers/poe> (last visited Feb. 4, 2018).

business. Thus, the danger of the professional-standards cases addressed in this Article may lurk for students studying in *any field* that helps to prepare them for a job. Given the potential for widespread deployment of professional standards across public university curricula and the threats those standards pose to the First Amendment freedom of speech, it is time for the nation's highest court to weigh in on the issue.